UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

346 Mx. North
Reference only

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1942

1942.

THE
LAW REPORTS
OF THE INCORPORATED COUNCIL OF LAW REPORTING.

CHANCERY DIVISION,
AND CASES IN
LUNACY,
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

◆

EDITOR - - - - RALPH SUTTON, K.C.
ASSISTANT-EDITOR - - G. F. L. BRIDGMAN, *Barrister-at-Law.*

REPORTERS.

Court of Appeal: H. C. GARSIA, P. J. BOLAND, *Barristers-at-Law.*

Chancery Division: J. L. DENISON, H. LANGFORD LEWIS, K. R. A. HART, *Barristers-at-Law.*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6, STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY WATERLOW & SONS LTD., LONDON WALL, LONDON.

BIBL. LONDIN. UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR D. B. SOMERVELL, K.C., M.P.	ATTORNEY-GENERAL.
SIR D. P. MAXWELL FYFE, K.C., M.P.	SOLICITOR-GENERAL.
G. STANLEY POTT, Esq.	President of the Law Society.

ELECTED MEMBERS.

Chairman—SIR HERBERT CUNLIFFE, K.C., Lincoln's Inn.

Vice-Chairman—G. STANLEY POTT, Esq., Law Society.

F. P. M. SCHILLER, Esq., K.C. (Retired Nov., 1942),	Inner Temple.
SIR JOSHUA SCHOLEFIELD, K.C.	Middle Temple.
G. DUDLEY COLCLOUGH, Esq.	Law Society.
MEYRICK J. L. BEEBEE, Esq.	Inner Temple.
J. H. STAMP, Esq.	Lincoln's Inn.
W. TREVOR WATSON, Esq., K.C.	Gray's Inn.
H. J. WALLINGTON, Esq., K.C.	Gray's Inn.
H. B. VAISEY, Esq., K.C.	Bar Council.
W. PRICE, Esq.	Middle Temple.
SIR CHARLES DOUGHTY, K.C.	Bar Council.
J. G. TRAPNELL, Esq., K.C. (Appointed Nov., 1942),	Inner Temple.

Secretary—J. H. BOWMAN, Esq.,
6, Stone Buildings, Lincoln's Inn, London, W.C.2.

JUDGES
OF
THE COURT OF APPEAL,
1942.

Viscount Simon, *Lord Chancellor.*

Viscount Caldecote, *Lord Chief Justice of England.*

Lord Greene, *Master of the Rolls.*

Lord Merriman — *President of the Probate, Divorce, and Admiralty Division.*

Sir L. F. Scott
Sir F. D. MacKinnon
Viscount Finlay
Sir A. F. C. C. Luxmoore
Sir Rayner Goddard
Sir H. du Parcq
— *Lords Justices of the Court of Appeal.*

JUDGES
OF
THE CHANCERY DIVISION,
1942.

Sir C. J. W. Farwell
Sir C. A. Bennett
Sir G. T. Simonds
Sir F. D. Morton
Sir A. A. Uthwatt
— *Justices of High Court attached to Chancery Division.*

Sir D. B. Somervell, *Attorney-General.*

Sir W. A. Jowitt (Resigned March 4, 1942),
Sir D. P. Maxwell Fyfe (Appointed March 4, 1942),
— *Solicitor-General.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1942, will be as follows :—

In the First Series,
[1942] Ch.

In the Second Series,
[1942] 1 K. B. [1942] 2 K. B. [1942] P.

In the Third Series,
[1942] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adams, Vandyke *v.* 155
Apex Supply Co., In re 108
Arnold, In re 272
Attorney-General, Roadways Transport Development, Ld. *v.* 208

B.

Bailey, Robinson *v.* 268
Banca Commerciale Italiana, In re 406
Bernstein, Gillette Industries, Ld. *v.* 45
Best, In re 77
Bickerton's Settlement, In re 84
Bilston Corporation *v.* Wolverhampton Corporation 391
Bower's Settlement Trusts, In re 197
Bowring-Hanbury's Trustee *v.* Bowring-Hanbury 276
Butler's Settlement Trusts, In re 403

C.

Caidan, In re 90
City Housing Trust, Ld., In re 262
Clarke, In re 434
Coal Commission *v.* Earl Fitzwilliam's Royalties Co. 365
Cook *v.* Taylor 349

D.

Dalton, Lloyds Bank, Ld. *v.* 466
Dennis's Settlement Trusts, In re 283

E.

PAGE

Electric Transmission, Ld., Meye *v.* 290
Elwell, Stoker *v.* 243
Ezekiel's Settlement Trusts, In re 230

F.

Feversham's (Earl of) Contract, In re 33
Fitzwilliam's (Earl) Royalties Co., Coal Commission *v.* 365
Forster's Settlement, In re 199
Fraser-Taylor's Application, In re 40

G.

Gardner, In re 50
General Mortgage Society (Great Britain), Ld. 274
Gess, In re 37
Gillette Industries, Ld. *v.* Bernstein 45
Gordon, In re 131

H.

Hall, In re 140
Herrmann *v.* Metropolitan Leather Co., Ld. 248
Hoff, In re 298
Hunter's Lease, In re 124

I.

Inchcape (Earl), In re 394

J.

PAGE

Jacobs' & Stedman's Contract, In re – – – – – 400
Johnstone *v.* Swan Estates, Ld. – 98
Jones, In re – – – – 328

K.

King, In re – – – 413

L.

Lane *v.* Minister of War Transport – – – – 280, 354
Leicester Temperance & General Permanent Building Society's Application (Gough), In re – 340
Lester, In re – – – – 324
Lewis, In re – – – 424
Lindop, In re – – – 377
Lloyds Bank, Ld. *v.* Dalton – 466

M.

Margot Bywaters, Ld., In re – 121
Metropolitan Leather Co., Ld., Herrmann *v.* – – – 248
Meye *v.* Electric Transmission, Ld. – – – – – 290
Middlesex Brick Co., Ld., In re – 65
Midland Bank's Application, In re (Waller) – – – – 61
Minister of War Transport, Lane *v.* – – – 280, 354
Moorgate Estates, Ld., In re – 321
Morgan, In re – – – 345

O.

Ogilby, In re – – – – 288

P.

Parsons, In re – – – 335
Price & Williams, Williams-Ashman *v.* – – – 219

R.

Relton, Sun Life Assurance Society *v.* – – – – 384
Roadways Transport Development, Ld. *v.* Attorney-General 208
Robinson *v.* Bailey – – 268

PAGE

Ross, Smart Brothers, Ld. *v.* – 158
Routledge, In re – – – 457
Royal Mutual Benefit Building Society's Application, In re – 75
Rudd, In re – – – – 421

S.

Samuel, In re – – – 1
Sharman's Will Trusts, In re – 311
Skinner, In re – – – 82
Smallpiece, Wood *v.* – – 190
Smart Brothers, Ld. *v.* Ross – 158
Smith & Fawcett, Ld., In re – 304
Southern Railway Co., Worthing Corporation *v.* – – 178, 437
Stoker *v.* Elwell – – – 243
Styler, In re – – – – 387
Sun Life Assurance Society *v.* Relton – – – – 384
Sutcliffe, In re – – – 453
Swan Estates, Ld., Johnstone *v.* 98

T.

Tankard, In re – – – 69
Taylor, Cook *v.* – – – 349

V.

V. G. M. Holdings, In re – – 235
Vandyke *v.* Adams – – 155

W.

Ward, In re – – – – 294
Ward, Warrilow *v.* – – – 257
Waring, In re – – – 309, 426
Warrilow *v.* Ward – – – 257
Westway's Garage, Ld., In re – 356
Williams-Ashman *v.* Price & Williams – – – – 219
Wolverhampton Corporation, Bilston Corporation *v.* – – 391
Wood *v.* Smallpiece – – 190
Woolgar, In re – – – 318
Woolwich Equitable Building Society's Application (Haywood), In re – – – 253
Worthing Corporation *v.* Southern Railway Co. – 178, 437

CASES AFFIRMED, REVERSED, FOLLOWED, OVERRULED OR JUDICIALLY COMMENTED ON.

Adamson v. *Attorney-General* [1933] A. C. 257.
Dictum at p. 279 followed. *In re* Bickerton's Settlement **Uthwatt J. 84**

Bagnall v. *Carlton* (1877) 6 Ch. D. 130
Discussed. Robinson *v.* Bailey **Simonds J. 268**

Barnes v. *Addy* (1874) L. R.. 9 Ch. 244
Applied. Williams-Ashman *v.* Price and Williams **Bennett J. 219**

Beavan, In re - - - [1912] 1 Ch. 196
Applied. Bowring - Hanbury's Trustee *v.* Bowring-Hanbury **Bennett J. 276**

Benjamin, In re - - [1902] 1 Ch. 723
Applied. *In re* Gess **Morton J. 37**

Blaiberg, In re - - [1940] Ch. 385
Overruled. *In re* Samuel **C. A. 1**

Blyth v. *Fladgate* - - [1891] 1 Ch. 337
Distinguished. Williams-Ashman *v.* Price and Williams **Bennett J. 219**

Cain's Settlement, In re [1919] 2 Ch. 364
Per Warrington L.J., at p. 370. Referred to. *In re* Skinner **Morton J. 82**

Central Bahia Railway Co., Ld. (1902) 18 T. L. R. 503.
No longer of effect. *In re* General Mortgage Society (Great Britain), Ld. - - **Bennett J. 274**

Cooper v. *Jax Stores, Ld.* [1941] 1 K. B. 577
Distinguished. Johnstone *v.* Swan Estates, Ld. - **Morton J. 98**

Cowlishaw, In re - - [1939] Ch. 654
Distinguished. *In re* Best **Bennett J. 77**

Debtor, A, In re [No. 946 of 1926] [1939] Ch. 489.
Referred to. *In re* Gardner **Morton J. 50**

Deutsche Bank, In re - - [1921] 2 Ch. 30
Followed. *In re* Banca Commerciale Italiana **Simonds J. 406**

Dewar v. *Goodman* - [1908] 1 K. B. 94
Considered. *In re* Hunter's Lease - - **Uthwatt J. 124**

Dieckmann, In re - - [1918] 1 Ch. 33
Applied. *In re* Banca Commerciale Italiana - **Simonds J. 406**

Dougal v. *McCarthy* - [1893] 1 Q. B. 736
Distinguished. Meye *v.* Electric Transmission, Ld. **Bennett J. 290**

Drax, In re - - - [1903] 1 Ch. 781
Applied. Stoker *v.* Elwell **Simonds J. 243**

Duchess of Kingston's Case (1776) 2 Sm. L. C., 13th ed., 644.
Applied. *In re* Sharman's Will Trusts - - **Bennett J. 311**

Elcom. In re - - - [1894] 1 Ch. 303
Applied. *In re* Waring **C. A. 426**

Gold, In re - - - (1891) 8 Morr. 45
Referred to. *In re* Gardner **Morton J. 50**

Grayburn v. *Clarkson* (1868) L. R. 3 Ch. 605
Applied. *In re* Tankard **Uthwatt J. 69**

Griffith, In re - - - [1904] 1 Ch. 807
Applied. *In re* City Housing Trust, Ld. - **Bennett J. 262**

Hedderwick. In re - - [1933] 1 Ch. 669
Followed. *In re* Woolgar **Simonds J. 318**

Hill v. *Booth* - - [1930] 1 K. B. 381
Considered. *In re* Hunter's Lease - - **Uthwatt J. 124**

Hinckley & South Leicestershire Permanent Building Society v. *Freeman* [1941] Ch. 32.
Considered. *In re* Midland Bank's Application - **Uthwatt J. 61**

Hodge, In re - - - [1940] Ch. 260
Referred to. *In re* Lester **Simonds J. 324**

Hubback, In re - (1885) 29 Ch. D. 935
Applied. *In re* Rudd **Morton J. 421**

Inchiquin (Earl) v. *Burnell* (1795) 3 Ridg. Parl. Cas. 376.
Considered. *In re* Hunter's Lease - - **Uthwatt J. 124**

Johnson, In re - - [1940] W. N. 195
Not followed. *In re* Arnold **Simonds J. 272**

Keen, In re - - - [1937] Ch. 236
Applied. *In re* Jones **Simonds J. 328**

Kerr's Policy, In re (1869) L. R. 8 Eq. 331
Applied. Stoker *v.* Elwell **Simonds J. 243**

Lane v. *Minister of War Transport* [1942] Ch. 280.
Affirmed - - - **C. A. 354**

Lippard v. *Ricketts* (1872) L. R. 14 Eq. 291
Applied. Stoker *v.* Elwell **Simonds J. 243**

Lister, In re - - - [1926] Ch. 149
Applied. *In re* Sharman's Will Trusts - - **Bennett J. 311**

Llewellyn v. *Rous* - (1866) L. R. 2 Eq. 27
Applied. Coal Commission *v.* Earl Fitzwilliam's Royalties Co. **Bennett J. 365**

MacCarthy v. *Agard* [1933] 2 K. B. 417
Distinguished. *In re* City Housing Trust, Ld. - **Bennett J. 262**

Madras Irrigation & Canal Co., Ld., In re [1881] W. N. 120.
No longer of effect. *In re* General Mortgage Society (Great Britain), Ld. - - **Bennett J. 274**

Mara v. *Browne* - [1896] 1 Ch. 199
Applied. Williams-Ashman *v.* Price and Williams **Bennett J. 219**

Midland Bank, Ld., In re - [1941] Ch. 350
Considered. *In re* Midland Bank's Application - **Uthwatt J. 61**

National Provincial Bank v. *Liddiard* [1941] Ch. 158.
Considered. *In re* Midland Bank's Application - **Uthwatt J. 61**

Pointer, In re - - - [1941] Ch. 60
Criticized. *In re* Styler **Morton J. 387**

Preston Banking Co. v. *William Allsup & Sons* [1895] 1 Ch. 141.
Distinguished. *In re* City Housing Trust, Ld. - **Bennett J. 262**

Prior, In re - - [1921] 3 K. B. 333
Considered. *In re* Ward **Farwell J. 294**

Reckitt, In re - - [1932] 2 Ch. 144
Referred to. *In re* Skinner **Morton J. 82**

Reg. v. *Everist* (1847) 10 Q. B. 178, 193
Applied. Coal Commission *v.* Earl Fitzwilliam's Royalties Co. **Bennett J. 365**

Reg. v. *Hutchings* (1881) 6 Q. B. D. 300
Applied. *In re* Sharman's Will Trusts - - **Bennett J. 311**

Roadways Transport Development, Ld. v. *Attorney-General* [1941] Ch. 392.
Reversed - - - **C. A. 208**

Roper, In re - - (1890) 45 Ch. D. 126
Followed. *In re* City Housing Trust, Ld. - **Bennett J. 262**

Royal Bank of Scotland's Application, In re [1940] Ch. 857.
Distinguished. *In re* Fraser-Taylor's Application **Morton J. 40**

Sharp, In re - - - [1906] 1 Ch. 793
Referred to. *In re* Skinner **Morton J. 82**

Shelley's Case (1579) 1 Co. Rep. 93b.
Rule held not to apply. *In re* Routledge - **Bennett J. 457**

Shrewsbury Estate Acts, In re [1924] 1 Ch. 315.
Distinguished. *In re* Best **Bennett J. 77**

Smart Brothers v. *Ross* - [1942] Ch. 158
Followed. Sun Life Assurance Society *v.* Relton **Uthwatt J. 384**

Stillwell, In re - [1916] 1 Ch. 365
Not followed. *In re* Woolgar **Simonds J. 318**

Thomas v. *Hayward* (1869) L. R. 4 Eq. 311
Considered. *In re* Hunter's Lease - - **Uthwatt J. 124**

Townson v. *Tickell* (1819) 3 B. & Ald. 31
Considered and distinguished. *In re* Parsons - **Farwell J. 335**

Waring, In re - - [1942] Ch. 309
Reversed - - - **C. A. 426**

Wells' Will Trusts, In re [1940] Ch. 411
Per Simonds J., at p. 413. Referred to. *In re* Skinner **Morton J. 82**

West, In re - - - [1921] 1 Ch. 533
Considered. *In re* GORDON **Uthwatt J. 131**

Winslow Hall Estates Co. and United Glass Bottle Manufacturers Ld.'s Contract, In re [1941] Ch. 503.
Distinguished. COOK *v.* TAYLOR **Simonds J. 349**

Woodall v. *Clifton* - - [1905] 2 Ch. 257
Referred to. *In re* HUNTER'S LEASE - - **Uthwatt J. 124**

Woolwich Equitable Building Society's Application (Haywood), In re. [1942] Ch. 253.
Approved. *In re* LEICESTER TEMPERANCE AND GENERAL PERMANENT BUILDING SOCIETY'S APPLICATION (GOUGH) - - - **C. A. 340**

Worthing Corporation v. *Southern Ry. Co.* [1942] Ch. 178.
Affirmed - - - **C. A. 437**

RULES AND ORDERS JUDICIALLY CONSIDERED.

Companies (Winding-up) Rules, 1929 (*St. R. & O.,* 1929, *No.* 612), *r.* 83. *In re* WESTWAYS GARAGE, LD. **Bennett J. 356**

—— —— *r.* 150. *In re* GENERAL MORTGAGE SOCIETY (GREAT BRITAIN), LD. - - - **Bennett J. 274**

Defence (General) Regulations, 1939 (*St. R. & O.,* 1939. *No.* 927), *reg.* 51 (1). COOK *v.* TAYLOR **Simonds J. 349**

—— —— *reg.* 53. LANE *v.* MINISTER OF WAR TRANSPORT **Farwell J. 280 ; C. A. 354**

Matrimonial Causes Rules, 1937, *rr.* 62, 81. *In re* WOOLGAR - **Simonds J. 318**

Purchase Tax (No. 2) *Regulations,* 1940 (*St. R. & O., No.* 2194 *of* 1940), *reg.* 11, *sub-reg.* 1. *In re* MARGOT BYWATERS, LD. - **Simonds J. 121**

R. S. C., Or. IX., *r.* 14B, *sub-r.* 1. VANDYKE *v.* ADAMS - - **Farwell J. 155**

—— *Or.* XXVIII., *r.* 11. *In re* INCHCAPE **Morton J. 394**

—— *Or.* LV., *r.* 71. *In re* CITY HOUSING TRUST, LD. - **Bennett J. 262**

Trading with the Enemy (Custodian) Order, 1939 (*St. R. & O.,* 1939, *No.* 1198), *para.* 1 (1). *In re* FORSTER'S SETTLEMENT - **Morton J. 199**

STATUTES JUDICIALLY CONSIDERED.

1623.

21 Jac. 1, c. 16 (*Limitation*). Bowring-Hanbury's Trustees *v.* Bowring-Hanbury - **Bennett J. 276**

1838.

1 & 2 Vict. c. 110 (*Judgments*), s. 14. Stoker *v.* Elwell **Simonds J. 243**

1870.

33 & 34 Vict. c. 35 (*Apportionment*), s. 2. Coal Commission *v.* Earl Fitzwilliam's Royalties Co. **Bennett J. 365**

1894.

57 & 58 Vict. c. 30 (*Finance*), s. 2, sub-s. 1 (*a*), (*c*); s. 5, sub-s. 2 (as amended); s. 9, sub-s. 6; s. 22, sub-s. 2 (*a*). *In re* Hall - - **C. A. 140**

—— —— s. 5, sub-s. 2; s. 22, sub-s. 2 (*a*). *In re* Parsons **Farwell J. 335**

1914.

4 & 5 Geo. 5, c. 59 (*Bankruptcy*), s. 26, sub-s. 2; s. 51, sub-s. 1. *In re* Gardner - - **Morton J. 50**

—— —— s. 33, sub-s. 4. *In re* Caidan **Morton J. 90**

—— —— s. 69. *In re* Ward **Farwell J. 294**

1920.

10 & 11 Geo. 5, c. 17 (*Rent and Mortgage Interest* (*Restrictions*)), s. 1; s. 12, sub-s. 1 (*b*). Warrilow *v.* Ward **Farwell J. 257**

1925.

15 Geo. 5, c. 19 (*Trustee*), s. 15 (*f*). *In re* Ezekiel's Settlement Trusts **C. A. 230**

15 Geo. 5, c. 20 (*Law of Property*), s. 184. *In re* Lindop - **Bennett J. 377**

15 Geo. 5, c. 23 (*Administration of Estates*), s. 34, sub-s. 2. *In re* Rudd **Morton J. 421**

—— —— s. 46, sub-s. 1; s. 55, sub-s. 1 (*x*) *In re* Ogilby - **Simonds J. 288**

15 Geo. 5, c. 25 (*Army and Air Force* (*Annual*)), sch. II. Roadways Transport Development, Ld. *v.* Attorney-General **C. A. 208**

1926.

16 & 17 Geo. 5, c. 60 (*Legitimacy*), s. 10, sub-s. 2. *In re* Hoff **Farwell J. 298**

1929.

19 & 20 Geo. 5, c. 23 (*Companies*), s. 45, sub-s. 1. *In re* V. G. M. Holdings, Ld. - - - **C. A. 235**

—— —— s. 153. *In re* General Mortgage Society (Great Britain), Ld. **Bennett J. 274**

1930.

20 & 21 Geo. 5, c. 24 (*Railways* (*Valuation for Rating*)), s. 18, sub-s. 3. Worthing Corporation *v.* Southern Railway Co. **Uthwatt J. 178; C. A. 437**

1938.

1 & 2 Geo. 6, c. 45 (*Inheritance* (*Family Provision*)), s. 1. *In re* Styler **Morton J. 387**

1 & 2 Geo. 6, c. 52 (*Coal*), s. 5, sub-s. 2 (*b*); s. 8 (*c*). Coal Commission *v.* Earl Fitzwilliam's Royalties Co. **Bennett J. 365**

1939.

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1, sub-s. 2. Warrilow *v.* Ward - - **Farwell J. 257**

—— —— s. 1, sub-s. 2 (*a*) (ii.). Smart Bros., Ld. *v.* Ross - **C. A. 158**

—— —— s. 1, sub-s. 2 (*a*) (ii.) (iv.). *In re* Royal Mutual Benefit Building Society's Application **Uthwatt J. 75**

Sun Life Assurance Society *v.* Relton - - **Uthwatt J. 384**

—— —— s. 1, sub-s. 2 (*a*) (ii.), sub-s. 4. *In re* Fraser-Taylor's Application - - **Morton J. 40**

In re Woolwich Equitable Building Society's Application (Haywood) - **Farwell J. 253**

In re Leicester Temperance and General Permanent Building Society's Application (Gough) - - - **C. A. 340**

—— —— s. 1, sub-s. 3; s. 3, sub-s. 2. Wood *v.* Smallpiece - **C. A. 190**

—— —— s. 1, sub-s. 4. *In re* Midland Bank's Application **Uthwatt J. 61**

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1, sub-s. 5. *In re* Middlesex Brick Co. **Simonds J. 65**

2 & 3 Geo. 6, c. 71 (*Rent and Mortgage Interest Restrictions*), sch. I. Warrilow *v.* Ward **Farwell J. 257**

2 & 3 Geo. 6, c. 72 (*Landlord and Tenant* (*War Damage*)), s. 1, sub-ss. 1, 4. Johnstone *v.* Swan Estates, Ld. **Morton J. 98**

—— —— s. 15, sub-s. 3; s. 24. Herrmann *v.* Metropolitan Leather Co., Ld. - - **Uthwatt J. 248**

2 & 3 Geo. 6, c. 89 (*Trading with the Enemy*), s. 3A, sub-s. 3. *In re* Banca Commerciale Italiana **Simonds J. 406**

—— —— s. 7, sub-s. 1. *In re* Forster's Settlement - **Morton J. 199**

2 & 3 Geo. 6, c. 108 (*Possession of Mortgaged Land* (*Emergency Provisions*)), s. 1, sub-s. 2; s. 2, sub-ss. 1, 2. Wood *v.* Smallpiece **C. A. 190**

2 & 3 Geo. 6, c. 114 (*Execution of Trusts* (*Emergency Provisions*)), s. 1, sub-s. 1. *In re* Earl of Feversham's Contract **Morton J. 33**

1941.

4 & 5 Geo. 6, c. 12 (*War Damage*), s. 18; s. 20, sub-s. 1. *In re* Jacob's and Stedman's Contract **Farwell J. 400**

4 & 5 Geo. 6, c. 24 (*Liabilities* (*War-Time Adjustment*)), s. 26, sub-s. 2. Smart Bros., Ld. *v.* Ross - **C. A. 158**

4 & 5 Geo. 6, c. 30 (*Finance*), s. 25, sub-s. 1. *In re* Waring **Farwell J. 309; C. A. 426**

4 & 5 Geo. 6, c. 41 (*Landlord and Tenant* (*War Damage*) (*Amendment*)), s. 11. *In re* Moorgate Estates, Ld. **Uthwatt J. 321**

Army Act, s. 113, sub-s. 4; s. 115. Roadways Transport Development Ld. *v.* Attorney-General **C. A. 208**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re SAMUEL (DECEASED).

JACOBS *v.* RAMSDEN.

C. A.
1941
BENNETT J.
Mar. 21, 27, 28, 31.

C. A.
July 29, 30, 31;
Aug. 1.

Will—Condition subsequent—Forfeiture clause—Validity—Prohibition of marriage with a person not " of Jewish parentage and of the Jewish " faith."

A testator, who gave a legacy and a share of residue to an unmarried daughter which he settled on her and her issue, provided by a clause in his will that, if his daughter should at any time after his death contract a marriage with a person " not of Jewish " parentage and of the Jewish faith " the trusts, powers and provisions in favour of that daughter and her issue and any husband so married to her should cease and determine, and his will should operate as if his daughter had died at the date of the marriage. The testator having died, the daughter married a man who was not of Jewish parentage or faith :—

Held (reversing the decision of Bennett J.), that the condition in the will was not void for uncertainty, but operated to effect a forfeiture. Having regard to the context, the words " of Jewish " parentage " meant that both parents of the daughter's husband must have been of the Jewish religion at the date of his birth, and the words " of the Jewish faith " that the husband must be a Jew by religion.

In re Blaiberg [1940] Ch. 385 overruled.

ORIGINATING SUMMONS.

By his will dated February 24, 1915, the testator, Barnett Samuel, gave a legacy of 20,000*l.* to his trustees on the like trusts for the benefit of his daughter, Edna Samuel, on her

C. A.
1941

SAMUEL, *In re.*
JACOBS *v.* RAMSDEN.

attaining the age of twenty-five, as were thereinafter contained concerning a share in the testator's residuary estate settled on his said daughter and her issue. The trustees were to pay the income to his daughter during her life, for her separate use and without power of anticipation during coverture, and then for her children as she should appoint, and in default of appointment for all her children who should attain twenty-one or marry in equal shares, with power to appoint a life interest to her husband. The trusts were subject to a proviso contained in the will by which the testator declared that if "my said "daughter Edna Samuel shall at any time after my death con- "tract a marriage with a person who is not of Jewish parentage "and of the Jewish faith then as from the date of such marriage "all the trusts powers and provisions in this my will contained "and at that date subsisting and capable of taking effect there- "after in favour of (*a*) my said . . . . daughter . . . . contracting "such marriage or (*b*) the person with whom . . . . she shall "contract such marriage . . . . or (*c*) any child or children "thereafter to be born of . . . . her or (*d*) the issue of any such "last-mentioned child or children shall cease and determine "and be no longer exercisable and this my will shall thence- "forth operate and take effect as if my said . . . . daughter ". . . . had died at the date of such marriage . . . ."

The testator died on June 2, 1925, and his will was proved on September 9, 1925, by his widow and two other executors named in his will. The testator left him surviving four children, one son, Ivor Dudley Samuel, who had since died, and three daughters, namely, Olga Esther Roys, Amelia Jacobs, and Edna Samuel. Mrs. Roys had three children, two of whom were of age, and one, Mrs. Bates, who was married. Mrs. Jacobs had one son who attained the age of twenty-one years in 1939.

On March 5, 1927, Edna Samuel was married to Harold Clayton, who was not of Jewish parentage and never had been of the Jewish faith. Deeds of family arrangement had been executed between the parties under which it was agreed that Mrs. Clayton should retain out of the life interests of her two sisters the income of her legacy and share of residue which it was assumed she had forfeited on her marriage.

A summons was taken out by the plaintiffs, Mrs. Amelia Jacobs, her son, Kenneth Michael Jacobs, and the trustees of a voluntary settlement of Mrs. Jacobs' share, and asked (inter alia) whether, having regard to the proviso in the will, the trusts, powers and provisions in favour of the defendant, Edna Violet Clayton, and her husband and issue ceased and determined on her marriage.

C. A.
1941
SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

Roxburgh K.C. and *Danckwerts* for the plaintiffs. The forfeiture clause is valid and there has been a forfeiture. Under the clause, two conditions must be fulfilled, namely, that, to avoid forfeiture, Mrs. Clayton must have married someone "of Jewish parentage" and "of the Jewish faith." Mrs. Clayton has broken both conditions. Applied to parentage, the word "Jewish" is clear and certain. It means, and has always meant, racially Jewish. That meaning cannot change, even though it may be difficult, under the conditions of modern life, always to ascertain whether or not a person is racially Jewish. In the present case, Mr. Clayton is clearly not racially Jewish. The phrase "of the Jewish faith" is also clear. The word "Jewish" refers, not to race, nor to a state of mind involving a certain religious belief. Ascertaining the faith of a person may present difficulty, but there can be none in ascertaining that a person is not of the Jewish faith, for what has to be considered is, not whether the faith of the person concerned has a particular inward or spiritual significance, but the much more easily ascertainable fact whether he is a member of the community which professes the Jewish faith. True, that in *In re Blaiberg's Will Trusts* (1) and *In re Blaiberg* (2) where the words to be construed were "cease "or fail to profess the Jewish faith" and "of the Jewish faith," it was held that the court could not ascertain whether a person was "of the Jewish faith," but both these decisions are wrong. Farwell J.'s judgment in *In re Blaiberg's Will Trusts* (1), if and so far as it proceeds on his inability to attach any meaning to the words "cease or fail to profess," has nothing to do with the present case. Morton J. in *In re Blaiberg* (2)

(1) Unrep.: Dec. 14, 1938.

(2) [1940] Ch. 385.

conceded that it might be possible to ascertain the tenets of the Jewish faith. His judgment is based on the view that it is impossible to ascertain the state of a person's mind. In *Hodgson* v. *Halford* (1) the condition was held to be valid: see also *Perrin* v. *Lyon* (2). In *In re Joseph* (3), there were the exact words, but the case was decided on a different ground and the point was never argued. If an expression has a clear meaning when contained in a penal statute, it cannot be uncertain when it occurs in a will. The Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 47 and 48, contain the expression "a person of the Jewish religion," and s. 135 and the following sections deal with legal proceedings under the Act. There is no difference in the meanings of the expressions "of the Jewish faith" and "of the Jewish "religion," and the meaning of the latter, occurring, as it does in a penal statute, cannot be uncertain. [They referred also to the Workshop Regulation Act, 1867, Amendment Act, 1871 (34 Vict. c. 19), which contains the expression "persons "professing the Jewish religion," the Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), and the Jews Relief Act, 1858 (21 & 22 Vict. c. 49).] The decision of the Court of Appeal in *In re May* (4) binds the court to accept the phrase "being "a Roman Catholic" as having a meaning which is certain. That case is indistinguishable from the present. [They referred to *Patton* v. *Toronto General Trusts Corporation* (5).]

Beyfus K.C. and *Bonner* for the Anglo-European Finance Corporation, an incumbrancer of a share in residue. The forfeiture clause is valid and there has been a forfeiture. The decisions in *In re Blaiberg's Will Trusts* (6) and *In re Blaiberg* (7) do not prevent the court from so holding, since one judge of first instance is not bound by another: *Forster* v. *Baker* (8), *Green* v. *Berliner* (9). The words "of Jewish parentage" clearly refer to a person whose parents at the date of his or her birth were of the Jewish religion. That is their clear and

(1) (1879) 11 Ch. D. 959.
(2) (1807) 9 East. 170.
(3) [1908] 1 Ch. 599; 2 Ch. 507.
(4) [1932] 1 Ch. 99.
(5) [1930] A. C. 629.
(6) Unrep.: Dec. 14, 1938.
(7) [1940] Ch. 385.
(8) [1910] 2 K. B. 636, 638.
(9) [1936] 2 K. B. 477, 493.

obvious meaning. Race has nothing to do with the matter. In English law "Jew" has always meant a person of the Jewish religion, not a person of Jewish race. Socially, and outside law, "Jew" often has a racial connotation. Disraeli, although he was baptized when thirteen years old, is often spoken of as a Jew. In England, legislation specially providing for Jews does so because of their religion and of the difficulties which may be made for them by legislation suitable for Christians, such as that directed to the observance of Sunday. In the Ballot Act, 1872 (35 & 36 Vict. c. 33), is the expression "persons of the Jewish persuasion": see also the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8, sub-s. 1 (*b*); the Oaths Act, 1909 (9 Edw. 7, c. 39); the Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102); the Shops (Sunday Trading Restriction) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 53), s. 7; *In re De Wilton* (1); *In re Cohen* (2); and *Keren Kayemeth le Jisroel, Ld.* v. *Inland Revenue Commissioners* (3); *Shore* v. *Wilson* (4); *Yelverton* v. *Longworth* (5); *In re Mylne* (6); and *In re Evans* (7). The legislature takes the view that the phrase "Jewish faith" or "Jewish religion" refers to the outward, and easily ascertainable, status, and not to the inner mind. Had Farwell J. in *In re Blaiberg's Will Trusts* (8) and Morton J. in *In re Blaiberg* (9) had cited to them the earlier authorities and also these statutes, their decisions might well have been different. On the evidence there is no doubt that Mr. Clayton is neither of Jewish parentage nor of the Jewish faith.

Gray K.C. and *Morle* for Mrs. Ray and her daughters. The forfeiture clause is valid and forfeiture has taken place since both of the conditions have been broken. If and where there is a difference between the construction put forward by the plaintiffs and that put forward by the incumbrancer, Mrs. Ray and her daughters prefer to adopt the latter. [They referred to *In re Lanyon* (10), *Sifton* v. *Sifton* (11) and

(1) [1900] 2 Ch. 481, 489.
(2) (1919) 36 Times L. R. 16.
(3) [1931] 2 K. B. 465, 494.
(4) (1842) 9 Cl. & F. 355, 531.
(5) (1864) 10 Jur. (N. S.) 1209, 1215.
(6) [1941] W. N. 57.
(7) [1940] Ch. 629.
(8) Unrep.: Dec. 14, 1938.
(9) [1940] Ch. 385.
(10) [1927] 2 Ch. 264.
(11) [1938] A. C. 656.

C. A.
1941

SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

Patton v. *Toronto General Trusts Corporation* (1).] The court, even if it does not distinguish the present case on the terms of the will, ought to decline to follow the decision of Morton J. in *In re Blaiberg* (2). In *In re Evans* (3) Farwell J. appears to have approved the principle followed by Morton J. in that case, but nowhere to have said that he was approving Morton J.'s decision as to the particular words of the will.

Humphrey King for Yvonne Roys, an infant granddaughter. The forfeiture clause is valid, and forfeiture has taken place for the reasons advanced. As to being "of the Jewish faith," as a matter of history and of law, being "Jewish" depends, not on religious belief, but on membership of the Jewish community. Thus, no inquiry into a state of mind is necessary, but, even if it were, the law can inquire into states of mind. It very often does so, as, for example, in criminal trials where mens rea is the essence of an offence. There is here no difficulty in ascertaining when the forfeiture occurred, namely, on the marriage. Even if there were difficulty, that would not make the forfeiture clause void. That is clear from *Sifton* v. *Sifton* (4), in which the Privy Council accepted the principle, laid down by Lord Cranworth in *Clavering* v. *Ellison* (5), and treated by Russell J. as the governing decision on the matter in *In re Lanyon* (6), that "where a vested estate "is to be defeated by a condition on a contingency that is to "happen afterwards, that condition must be such that the "Court can see from the beginning, precisely and distinctly, "upon the happening of what event it was that the preceding "vested estate was to determine." Farwell J. in *In re Blaiberg's Will Trusts* (7) and Morton J. in *In re Blaiberg* (2) ought not to be put forward as authorities for the invalidity of the condition. Those are recent decisions and are not covered by the principle that the court ought not to differ from a decision of long standing which has been repeatedly followed. Also, the court is not bound by decisions of a

---

(1) [1930] A. C. 629.
(2) [1940] Ch. 385.
(3) [1940] Ch. 629.
(4) [1938] A. C. 656.
(5) (1859) 7 H. L. C. 707, 725.
(6) [1927] 2 Ch. 264.
(7) Unrep.: Dec. 14, 1938.
(8) [1940] Ch. 385.

C. A.
1941

SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

court of co-ordinate jurisdiction. [He referred to *In re Bethlem Hospital* (1); *Osborne to Rowlett* (2).]

Vaisey K.C. and *Winterbotham* for Mrs. Edna Violet Clayton. The forfeiture clause is void for uncertainty, and Mrs. Clayton has not forfeited her interest by marrying. As to "of Jewish "parentage," if the court is going to say that those words mean that both parents must be members of the Jewish community, the question immediately arises whether that means the orthodox, reform or liberal section of that community. It is possible to contend for many meanings of the expression "of Jewish parentage." An attractive suggestion is that the word "Jewish" has a racial significance. The religious significance is provided in the other half of the condition. The testator is most likely to have desired his child to have a husband or wife, not merely of the Jewish faith, but of the Jewish race. Or the phrase may mean "being "the child of parents who held the Jewish faith at the time "the child was born," that is, were then of a particular state of mind. A third possible meaning is that, at the time of the child's birth or previously, the parents were members of some Jewish religious community. The words might bear all those meanings and the context might show which of the three meanings is to be attributed to them. Here it does not. They are ambiguous. [They referred to *Sifton* v. *Sifton* (3); Theobald on Wills, 9th ed., p. 513.] The expression "of the "Jewish faith" might have been used by the testator to show that he wished his child's husband to be Jewish by conviction, but the words are as lacking in clarity as "of Jewish parentage." In *In re Blaiberg's Will Trusts* (4), Farwell J. said that it was one thing to "profess" the Jewish religion, and another to "fail to profess" it. If a person is referred to as a Roman Catholic, it is quite obvious that religion is meant. If a person is referred to as a Jew, it is not clear whether race or religion is meant. On that ground the present case is distinguishable from *In re May* (5). It cannot be said with certainty what

---

(1) (1875) L. R. 19 Eq. 457, 460.

(2) (1880) 13 Ch. D. 774, 779, 781.

(3) [1938] A. C. 656.

(4) Unrep.: Dec. 14, 1938.

(5) [1932] 1 Ch. 99.

C. A.
1941
SAMUEL, *In re.*
JACOBS *v.* RAMSDEN.

the testator meant by either of the two sets of words he used. The condition is thus clearly void for uncertainty: *Clavering* v. *Ellison* (1).

BENNETT J. [after stating the facts:] The question which I have to determine is whether or not the condition in the will, being a condition subsequent, is void for uncertainty. The condition has reference to the qualifications of the man whom Mrs. Clayton marries. He has to have two qualifications, and, if he lacks either of them, then, according to the terms of the will, the trusts in favour of Mrs. Clayton and her children are brought to an end. The qualifications that the husband is to have are, first, that he is to be of Jewish parentage; secondly, that he is to be of the Jewish faith. Both phrases, when you come critically to examine them, are of doubtful meaning.

What did he mean, first of all, by those words "of Jewish "parentage"? Was he referring to the race of the husband's parents or was he referring to the religion of the husband's parents? If the words have reference to the religion of the husband's parents, have they reference to the religion of both of the husband's parents? If they have reference to the religion of both of the husband's parents, then at what point of time? When the meaning of the words is closely considered, it becomes clear, I think, that they are capable of several meanings.

Mr. Roxburgh, who argued the case on behalf of the plaintiffs, suggested that primarily the words had reference to the race of the parents—that, in considering the race of the parents, you could also look at their religion, but that prima facie the words had reference to their race. When you speak of a man's race in this connection, what do you mean? What is meant by a person being of the Jewish race? Is it that he is in direct descent both in the male line and the female line from the patriarch Jacob? I do not know. Certainly one possible view is that the words have reference to the race of both parents. Another view, advanced by Mr. Beyfus, was that the words have no reference to race at all and that race has not to be considered in the matter, but that the sole question is what was the religion of both parents at the moment of the husband's birth. He argued that there was no difficulty about answering that question, because everybody knows that in these days religion is organized and that it is possible to find out whether or not the father of the husband and the mother of the husband were members of a religious community professing the Jewish faith and, if it was ascertained that they were of that faith at the date when the husband was born, then the condition was fulfilled, the husband was of Jewish parentage, but, if they were not, the condition had been broken.

---

(1) 7 H. L. C. 707.

With these possible meanings to be put on the words, the question is whether the qualification is so precise and distinct that effect can be given to this part of the condition, or whether it is void for uncertainty. I think that the law is now summarized in a judgment of Lord Romer in *Sifton* v. *Sifton* (1), a decision of the Privy Council, where property was devised in trust to pay to the testator's daughter a sum sufficient in the judgment of the trustees to maintain her suitably until she was 40 years of age, after which the whole of the income of the estate was to be paid to her annually. The payments to the testator's daughter were to be made to her "only so long as "she shall continue to reside in Canada." The Privy Council held that the provision that the payments were to be made "only so long as she shall continue to reside in Canada" was a condition subsequent which was void for uncertainty, plainly, I think, on the ground that it was not possible to define precisely or distinctly the language which that testator used, and it was so because there was nothing in the will of the testator which gave any clue to the sense in which he in his will had used the word "reside." It was for that reason that the Privy Council held the condition void for uncertainty. In this will there is no clue to the sense in which this testator used the words " of Jewish parentage," nothing to indicate whether he had used them with reference to the race of the parents, or with reference to their religion.

The conclusion at which I have arrived with regard to that

(1) [1938] A. C. 656.

part of the condition is, founding myself on the authority of *Sifton* v. *Sifton* (1), that it is void for uncertainty.

The condition, however, also operates if the lady's husband is not of the Jewish faith, and, therefore, it is necessary to consider the validity of this part of the condition. It is truly said that this part of the condition has been considered by Morton J. in *In re Blaiberg* (2), and that he has decided that it is void for uncertainty, because before the court can say whether a person is or is not of a particular religious belief the court has to inquire into the state of that person's mind. Morton J. said (3) that the court is unable to ascertain with certainty what is the state of a person's mind, and he followed an earlier decision on the same will of Farwell J. (4). It is conceded by those who are arguing for the validity of the condition that these decisions cover the point, but it was said that they are against the current of authority and that the earlier cases on the subject were not brought to the attention either of Farwell J. or of Morton J. and it certainly is the fact that some of the cases cited to me were not called to the attention either of Morton J. or of Farwell J. It is also truly said that there are in statutes imposing penalties references to persons of the Jewish religion who are exempt in certain circumstances from those penalties, and in those cases Parliament has cast on magistrates the duty of inquiring into the state of the religious belief of a person charged that they may find out whether he is or is not subject to penalties. I was pressed with the argument that the decisions of Farwell J. and Morton J. may have been given in circumstances in which all relevant matters were not called to their attention, but, at the same time, as the words here are identical with the words on which Morton J. had to adjudicate, I do not think it would be either right or wise of me, even if I were so inclined, not to follow his decision. Such a course would only tend, I think, to confuse the law. It is much better in a matter of this kind for the matter to be considered and decided by a

---

(1) [1938] A. C. 656.
(2) [1940] Ch. 385.
(3) Ibid. 391.
(4) *In re Blaiberg's Will Trusts.* Unrep.: Dec. 14, 1938.

C. A.
1941

SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

higher tribunal. I propose to follow the decision of Morton J. in *In re Blaiberg* (1), and to decide that that part of the condition in the testator's will which provides for forfeiture in the case of the marriage of the testator's daughter to a person not of the Jewish faith is also void for uncertainty.

The result is that the answer to the question which I have to decide should be that the condition for forfeiture contained in the testator's will is void for uncertainty.

The plaintiffs appealed.

Roxburgh K.C. and *Danckwerts* for the plaintiffs. Bennett J. erred in holding that the condition in clause 8 of the testator's will was void for uncertainty. It is plainly a condition subsequent, but it is not uncertain and not void for uncertainty. Bennett J. has given a wrong meaning to the decision in *Sifton* v. *Sifton* (2). The condition there was as to residence in Canada and it was held to be uncertain because it was not possible to define it with sufficient certainty to enable anyone to act on it. It must be possible to put a meaning on the condition which will tell the party interested with precision what he may or may not do. To decide this in the present case, it is primarily necessary to decide whether the words "of Jewish parentage" refer to race or religion. In the court below it was contended that they referred to race, but, having regard to the context and the passages in many authorities, it is now contended that they refer to religion. The person to be married must be of Jewish faith himself and have been born of parents who at the date of his birth belonged to the Jewish religion. Race involves the existence of a nation and in that sense the Jews have no race. Anyone referring to a Jew means that he is of the Jewish faith. Really, therefore, the same question arises under both parts of the condition and the question to be determined is whether it can be ascertained with certainty whether a man is of the Jewish faith. By this it is not meant that it has to be ascertained whether he holds fast to the tenets of the Jewish religion or attends Jewish religious services regularly. To satisfy this

(1) [1940] Ch. 385.

(2) [1938] A. C. 656.

condition here it is sufficient that the daughter's husband is, and his parents at the date of his birth were, members of a community organized on the basis of the Jewish religion: see *In re Knox* (1), *In re Evans* (2) and *In re Mylne* (3). There is no need to inquire into the state of a man's mind or to require some overt act to show the religion to which he belongs. [They referred to *Hodgson* v. *Halford* (4), *In re Joseph* (5) and *In re May* (6).] There is nothing in any of the early authorities to suggest that such a condition as the court is considering is void for uncertainty. The point was first raised in *In re Blaiberg's Will Trusts* (7), *In re Evans* (2) and *In re Blaiberg* (8). In *Patton* v. *Toronto General Trusts Corporation* (9) it was never suggested that there was any uncertainty about a provision requiring the testator's son to prove himself to be "of the Lutheran religion."

Rawlence for a trustee of the will.

Vaisey K.C. and *Winterbotham* for Edna Violet Clayton and her husband. Bennett J. was right. The condition is so uncertain that the court would never say that it operated to cause a forfeiture, to cause which the words must be perfectly clear. The provision that the husband must be of Jewish parentage must have regard to race, otherwise Miss Clayton could have married a negro or a Chinese professing the Jewish faith. Parentage with an adjective in front of it must refer to race. On the view, however, that the words "of Jewish "parentage" mean that both parents must have been of the Jewish faith, the question at once arises whether that means the orthodox, reformed or liberal section of those professing that faith. There would also be involved an investigation into the state of mind of each of the parents at the time of the birth of the son, or it would require to be shown that they were members of some Jewish religious community. These matters sufficiently show the uncertainty of the condition. It is true that there are many statutes making special provisions for

---

(1) (1889) 23 L. R. (Ir.) 542.

(2) [1940] Ch. 629.

(3) [1941] W. N. 57.

(4) (1879) 11 Ch. D. 959.

(5) [1908] 1 Ch. 599; [1908] 2 Ch. 507.

(6) [1932] 1 Ch. 99.

(7) Unrep.: Dec. 14, 1938.

(8) [1940] Ch. 385.

(9) [1930] A. C. 629.

Jews because of their religion, but it must be remembered that a defeasance clause requires the highest degree of certainty, and often a statute contains its own definition of what is meant. It has, further, to be remembered that from various causes many Jews have departed from following the Jewish faith. The condition cannot be valid in view of the test laid down in *Sifton* v. *Sifton* (1) requiring that persons affected by a condition should be able to say with certainty from the start what it requires. In view of the disturbed conditions of the world to-day, it might be impossible in the present case to ascertain the parents' religion. It must be almost impossible in many cases for a man to prove that his parents were of a particular religion. The court has to deal with a condition in which there is first a doubt whether the words "of Jewish parentage" refer to race or religion and then a doubt whether the words "of the Jewish faith" refer to religion or faith in the sense of personal belief. The court has to determine what the testator intended to express by the words of the condition, and, when the court cannot determine that, the condition is void for uncertainty: *Clavering* v. *Ellison* (2). It is there laid down that "when a "vested estate is to be defeated by a condition on a "contingency that is to happen afterwards, that condition "must be such that the court can see from the beginning, "precisely and distinctly, upon the happening of what event "it was that the preceding vested interest was to determine." *In re Blaiberg* (3) is directly in point here and was rightly followed by Bennett J. and his decision should stand. [They referred to *In re Borwick* (4) and *In re May* (5).]

Gray K.C. and *Morle* for other parties interested under the will.

LORD GREENE M.R. The testator in this case, like many other testators, has attempted to direct the lives of his children from the grave. Such a thing is distasteful to many

(1) [1938] A. C. 656.
(2) (1859) 7 H. L. C. 707, 725.
(3) [1940] Ch. 385.
(4) [1933] 1 Ch. 657.
(5) [1932] 1 Ch. 99.

people, and I can well understand the desire of a court to escape from such a result, if the language used and the law applicable so permit. In the present case Bennett J. held that the provision in question in the testator's will was void for uncertainty, and that accordingly the forfeiture clause did not operate. [His Lordship read the clause.] The principles on which forfeiture clauses are to be constructed are well known, and I need not repeat them. It is manifest that, if a testator uses words which are insufficient to describe his intention with such distinctness as to enable practical action to be based on them, the words must be too vague to be enforced. Words, for instance, which import conceptions involving degree or relativity may well be too vague, such as "large" or "small" or "tall." One very good example is to be found in *Sifton* v. *Sifton* (1). There the important word was "residence," to which in some contexts a sufficiently precise meaning can be given, while in other contexts there may be no possibility of defining the word in such a way as to enable anyone to act on it. Such was the case in *Sifton* v. *Sifton* (1). An example of a context in which "residence" has been found to be sufficiently precise is that in the Income Tax Acts, where residence in certain cases is of importance.

In the present case two questions fall to be considered in discussing the construction of the clause. The first is what is meant by the words "Jewish parentage." On the authority of *Sifton* v. *Sifton* (1) Bennett J. came to the conclusion that there was no clue in the will to the sense in which the testator used the words "of Jewish parentage," nothing to indicate whether he had used them with reference to the race of the parents or to their religion, and that, therefore, that part of the condition was void for uncertainty. That reasoning cannot stand if, as a matter of construction, it is possible to resolve the ambiguity which the learned judge found to exist. The first task in approaching the words of the condition is to construe them in their context, and I find myself able to do this without any real difficulty. It appears to me that they refer to religion and not to race. Before us the first argument

(1) [1938] A. C. 656.

C. A.
1941
SAMUEL,
In re.
JACOBS
v.
RAMSDEN.
Lord Greene
M.R.

based on that language was different from that which the learned judge appears to have adopted. It was contended that the words were capable of the construction that they referred to race and not to religion. It may well be that if, on the true construction of the words, they did refer to race, they might be too vague. It might be said that in the absence of any intimation of the percentage of Hebrew blood which the testator had in mind it would be impossible to determine whether or not a given person fell within the language used. I express no opinion on that matter. I merely intimate that the point would clearly have been one proper for argument. In my opinion, however, the context points rather to the fact that the testator was thinking not of race but of religion. To my mind it is obvious from the requirements which he lays down for the husband that it is religion of which he is thinking and that he wishes his daughter to marry into the Jewish religion. That, I think, gives a clue to his intention when he goes back a generation and deals with the parents of the husband. It is reasonably clear that a testator who was actuated by such motives would not wish his daughter to marry a mere proselyte, who, perhaps, merely to satisfy the condition, has gone through the ceremony of being admitted to the Jewish faith. To avoid such a result he lays down a further condition, the effect of which in popular language is to ensure not only that the husband shall belong to the Jewish faith at the date of the marriage, but also that he shall have been born into it by reason of the fact that his parents were of that faith. I think that this view is strengthened by the fact that the testator must have known that the question of what is meant by " Jewish " is one of the greatest difficulty and in practice must necessarily involve all sorts of matters and leave many in doubt. That, I think, is a legitimate consideration to bear in mind in deciding what construction the testator intended to be placed on the language he used, because it must not be assumed that he was doing something of the difficulties of which he was ignorant, which, in fact, he could scarcely have been.

Two other matters arise with regard to the expression

C. A.
1941
SAMUEL, *In re.*
JACOBS *v.* RAMSDEN.
Lord Greene M.R.

"Jewish parentage." The first is whether it refers to both parents or only to one, and the second is, the point of time to which reference is made. With regard to both those questions I feel no doubt. It seems to me that the ordinary meaning of the language in a context of this kind is that it refers to both parents and to the time when they became parents, that is to say, the birth of the husband. No test can be watertight, and it might be that a husband who satisfied this condition would not be the sort of husband that the testator would have desired, but in practice, one would think, this was as good a working test as any to ensure that the husband of the testator's daughter should be so confirmed in the Jewish faith as to be not merely a member of it but also born of parents who likewise held it. That, therefore, is the construction of this language which I consider is the right one, and the result is that the reasoning of the learned judge on this part of the case cannot stand.

On the meaning of the words " Jewish parentage," it was argued that insuperable difficulties might exist in ascertaining the necessary facts with regard to the parents of the husband. It was said that many Jews, both now and in earlier times, have moved about the world and their parentage may often be unknown, that the religious beliefs of their parents may also be unknown, and that it may, therefore, be impossible to establish the facts, but that has nothing to do with the question of uncertainty because we are proceeding on the footing that the language is certain. The argument is really directed, not to uncertainty, but to difficulty in proving facts, and, in my opinion, the mere difficulty of proving facts is not of itself sufficient to render a clause of this kind too vague. Moreover, the burden of establishing the forfeiture rests on those who allege that it has taken place, and, if the facts as to the religion of the parents of the husband are impossible to ascertain, all that results is that the forfeiture cannot be established. It may very well be that a lady who is confronted with a clause of this kind and is unable to ascertain the necessary facts with regard to the parents of her intended husband may have to take a chance, but that does not mean that the wording

C. A.
1941

SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

Lord Greene
M.R.

of the condition is too vague. It merely means that in a particular case the facts which will bring or not bring the forfeiture clause into operation are difficult of ascertainment. In practice, I cannot help thinking, these questions must be approached with a certain measure of common sense. In the case of a Jew, I should have thought that it ought not to be difficult to ascertain the religion of his parents.

The next argument was directed to the alleged vagueness of the expression " of the Jewish faith," and it applied both to the parents and to the husband. It is said that the phrase "of the Jewish faith " leaves it uncertain what tenets of that faith must be held, what degree of observance is required, what degree of fervour in the holding of beliefs is necessary to enable a husband to satisfy the condition. In my judgment, an expression of this kind in such a context as this is not to be construed by reference to sectarian disputes or theological arguments or to degrees of zeal in performance of religious duties or attendance at religious ceremonies. A much more practical test appears to me to be required. Prima facie the question falls to be answered out of the mouth of the person in question. Religious faith is a matter so serious that it is to be assumed that in the normal case a person who is asked whether or not he is a Jew by religion will give a perfectly conscientious answer. Mr. Vaisey drew an alarming picture of this lady surrounded, like Penelope, by a crowd of suitors, but condemned to perpetual spinsterhood because she would be unable to know whether or not marriage with any one of them would enable her to enjoy the advantages of a romantic union without forfeiting the solid benefits of a settled income. I should have thought that the lady in such a situation could resolve the question very simply by asking the gentleman of her choice whether or not he was of the Jewish faith, and, if he answered " Yes," I should have thought that prima facie that was enough. At any rate, I feel certain that the correctness or otherwise of the proposed husband's confession of faith would not fall to be ascertained by calling in a rabbi to cross-examine him with regard to the tenets of the faith with a view to finding out whether he was an orthodox Jew, a

C. A.
1941
SAMUEL,
In re.
JACOBS
v.
RAMSDEN.
Lord Greene
M.R.

reformed Jew, or a liberal Jew, or by inquiring into the precise degree of conviction or fervour with which he held certain specified tenets of the Jewish faith, or the frequency or sincerity of his observance of ceremonial or religious occasions. If a man, when asked a serious question of that kind, whether in the drawing room or in the witness box, answers: "I am "a Jew by faith," that, I should have thought, was the most cogent evidence that it was to that religion that his adherence was devoted, be it zealous or lukewarm, be it wide enough to cover every strict and orthodox tenet of the faith, or of a looser or more easy-going description. Whether or not a person who was born a Jew and alleged that he was a Jew had repudiated his religion could be established by evidence without much difficulty.

So far as the husband is concerned, therefore, I do not see any real difficulty about the matter. Whether or not he belongs to the Jewish faith in the sense which I have indicated is a question of fact, and if it were disputed that he belonged to the Jewish faith and a person claiming under the forfeiture clause was minded to assert and endeavour to prove that he did not, the question would have to be resolved by evidence, in which event, as I have said, the man's bona fide and sincere assertion that that was the faith to which he adhered would be of the utmost weight. As I have indicated, he might be cross-examined and be shown to have repudiated that faith, and in that case the court would not believe what he had originally said.

With regard to the position of the husband's parents precisely the same principles, in my opinion, apply. It may or may not be more difficult in the case of the parents to ascertain whether or not at the date of the birth of the husband they adhered to the Jewish faith. If they are alive, the difficulty, I apprehend, would be non-existent. If they are dead, the question of fact would fall to be proved in precisely the same manner as any other question of fact, and when the court had before it evidence of their upbringing and their religious observances it should have no difficulty in answering the question. In any event, to repeat what I have said, mere difficulty in ascertaining facts does not mean that the language into which those facts have to be fitted is too uncertain to be enforced.

I should mention here a distinction which it was attempted to make between the words "faith" and "religion" in a clause of this kind. It was said that "faith" involves the spiritual convictions of the person in question, while "religion," on the other hand, imports not merely that but also the element of ceremonial observance. It is to be noticed that on that argument a condition which used the word "religion" would be more vague than one which used the word "faith," because in each case the question of spiritual conviction and belief would fall to be considered and in the case of religion the additional element of ceremonial observance would enter. I make that observation in view of the fact that in some of the reported cases the word "religion" has appeared and on the argument put before us those cases were decided on a completely wrong view of the principles applicable to matters of this kind. In my judgment, there is no difference in such a context as this between the word "faith" and the word "religion." Testators, when they frame clauses of this kind, are not concerned with distinctions of that description. They intend the clause to be a practical working affair, to be construed without reference to the more subtle, and, no doubt, more accurate, conceptions of theologians.

Those are the conclusions to which I have come in construing this clause independently of authority. I now proceed to consider certain of the authorities dealing with this subject-matter. By way of preface it is right to point out that, so far as can be ascertained from any of the cases which have been cited to us, it was not until 1940 that any doubt was thrown either by the Bench or by the Bar in argument on the validity of provisions of this kind on the ground of uncertainty, although attacks had been made on them on the ground that they were against public policy. The first case to which I wish to refer is *Clavering* v. *Ellison* (1), decided in 1859, which was a case of a gift of residue to children to be

(1) 7 H. L. Cas. 707.

paid as they should attain twenty-one with a condition in these words: "Provided . . . . that the devises herein-"before contained to the children of my said son, are made "upon this express condition, that they be educated in "England and in the Protestant religion according to "the rites of the Church of England, and in case any "one or more of such children shall be educated abroad, "or not in the Protestant religion according to the rites of "the Church of England, then I do hereby revoke," the devises, and there was a gift over. The expression in that clause to which I wish to direct attention is "educated . . . . in the "Protestant religion according to the rites of the Church of "England." There are two passages in the opinions delivered which have a distinct bearing on the matters which we are now discussing. Lord Campbell L.C. said, and he said it, I think, clearly as a matter of decision and not as a mere matter of dictum (1): "We have now only to consider whether "there has been a forfeiture by a breach of the second condition, "that the children should be educated in the Protestant religion "according to the rites of the Church of England, as to which "I have never entertained the smallest doubt. It has been "argued as if the condition required the children to be taken "regularly to a place of public worship, where Divine service "should be celebrated, by a priest in orders, according to the "Book of Common Prayer, and where they might hear the "Athanasian Creed said or sung on all the Sundays and Saints' "days appointed by the Rubric for that purpose. I find no "language in the will upon which such construction can be "put, and I conceive the true meaning of the condition to be, "only, that the children should be brought up as Protestants "in communion with the Church of England. This they might "have been had they remained in England, although, on "account of sickness or distance from any place of public "worship, they might very rarely have had the advantage of "the ministrations of a regularly ordained clergyman, and "although the service from the Liturgy might have been read "by a female." It seems to me that Lord Campbell, in

(1) 7 H. L. Cas. 723.

construing the phrase which he had before him, repudiated the idea that it was to be construed in anything but a common sense and practical way and took the view that questions of degree of observance or things of that kind did not fall to be considered. The argument in the present case which was based on the word "religion" would have been a most important argument to advance in that case if it had been sound, but there is no trace of a suggestion that the meaning of the phrase "Protestant religion" as applied to the education of children was a matter on which any doubt could be felt. Lord Cranworth said (1): "With regard to their being "educated in the Protestant religion, I quite agree with my "noble and learned friend that the burthen of proof is on the "other side to show that they were not educated in the "Protestant religion. But it appears to me that they were "educated in the Protestant religion, so far as it was possible "that they should be so educated. There is no reason to "suppose that any of them were other than Protestants up "to the time when they attained twenty-one. After that, one "of the young ladies, having married a Roman Catholic, "abjured the Protestant religion and became a Roman "Catholic; but that does not show that she was not educated "in the Protestant religion . . . . There is evidence that "one of them was confirmed at St. George's. As to all of "them, Protestant services were performed so far as it was "possible that they should be performed; and as to the two "young ladies particularly, the evidence goes to show that "they were rather regular attendants at church while living "in the north of England. And for all intents and purposes, "if the burthen of proof had been upon them to show "that they were educated in the Protestant religion, I am "inclined to think that the affirmative is made out. That "the negative, namely, that they were not educated in "the Protestant religion, is not made out, appears to me "abundantly clear."

The next case in order of date is *Hodgson* v. *Halford* (2), decided by Hall V.-C. in 1879. There the testatrix, in

(1) 7 H. L. Cas. 726.

(2) 11 Ch. D. 959.

C. A.
1941
SAMUEL, *In re.*
JACOBS *v.* RAMSDEN.
Lord Greene M.R.

exercising a power of appointment by her will, declared that "if either during her life or after her death any son or daughter "of hers should marry a person who did not profess the "Jewish religion, or was not born a Jew though converted to "Judaism, or should forsake the Jewish and adopt the Christian "or any other religion, then such son or daughter should forfeit "all share in the fund." The argument there directed against the validity of that provision was based entirely on the view that it was contrary to public policy. No suggestion was made that the difficulty of ascertaining whether a person was born a Jew, whether he had forsaken the Jewish religion, or whether he professed the Jewish religion, was so great as to make the clause inoperative, or that it was so vague in its content and expressed a conception so completely uncertain as to be void. It is noticeable that Hall V.-C. said: "I cannot "in the absence of authority say that a parent or appointor "(and for this purpose I see no difference between them) "disposing by will either of his own property or of any property "over which he has a power of appointment, is not perfectly "justified in making a provision in favour of such of his "children as shall not embrace a particular faith—Christian, "Roman Catholic, Mahommedan, or any other." I do not think it possible that if Hall V.-C. or the profession had felt any doubt about the matter at that time, he could have used such language with regard to such a well known type of provision as this.

The next case to which I refer is *In re Knox* (1), a decision of the Court of Appeal in Ireland. There the condition was that, if the testator's son should marry, he should "marry a "Protestant wife, the daughter of Protestant parents, and "who have always been Protestants." If that question had fallen to be decided by reference to the matters which I have already mentioned—the particular tenets believed in, the particular degree of fervour or zeal, or the particular amount of attendance at religious ceremonies and observances, and so forth—the decision could not have been what it was, but there again nothing of the kind was suggested, nor was it suggested that there was any vagueness or uncertainty about the provision. In the judgment of the Court of Appeal in Ireland a passage appears which is valuable as showing what was commonly found in wills at that date. It is true that the reference is to Ireland, but provisions of the same kind have been made by testators in this country as well for many years. The judgment of the court was delivered by Naish L.J., and he said (1): "That being so, it appears to me that there "is nothing in the remaining questions to cause any difficulty. "Conditions of this kind, requiring a legatee or devisee to "marry persons of a particular religious denomination, and "forfeiting their interest if they did not, have been repeatedly "held valid, and it is now too late to question their validity." That is not a decision on the question of uncertainty (which was never argued), but it does show what the practice was and the way in which unsuccessful attacks on the ground of public policy had been made to upset it.

---

(1) 23 L. R. (Ir.) 542.

In *In re Joseph* (2) this court reversed the decision of Eve J., but on different grounds from those on which he arrived at his decision, and the matter to which I wish to call attention can only be seen by reference to the report of the hearing before that learned judge. The condition there under consideration was: "if any child or grandchild, or issue of such "grandchild, should marry a person not professing the Jewish "faith, such child, grandchild, or other issue should, for the "purposes of that his will, be deemed to have died in his "lifetime under twenty-one and unmarried." I refer to the case, not because there is anything in the judgment which bears on this question, but to show that there again there was no suggestion that the reference to the Jewish faith imported any element of uncertainty. It was said in argument that the reason was that the phrase there used was not that which we have here, "of the Jewish faith," but was "professing "the Jewish faith" and the word "professing" refers to some outward manifestation which can be easily tested and so introduces an element of certainty. It seems to me that that is much too subtle a distinction, and I notice, for what

(1) 23 L. R. (Ir.) 554.

(2) [1908] 1 Ch. 599; [1908] 2 Ch. 507.

it is worth, that counsel on both sides, and they were counsel of great eminence, in referring to the clause in argument did not deal with the word " professing " at all. The argument of Mr. P. O. Lawrence was: "First, the forfeiture clause at "the end of the will prohibiting marriage with any person "not of the Jewish faith does not apply to the substituted "settled legacy." Mr. Jessel said: "This settled legacy of "1500*l.* comes within the general declaration at the end of "the will as to forfeiture on marriage out of the Jewish faith." One must not lay too much stress on the report of an argument, and it is conceivable that learned counsel did carefully use the word " professing " to show that they were conscious of the fact that it was the vital word which saved the clause from failure for uncertainty. I prefer to take the view that it never occurred to them, whether the word was "professing," or whether the word was " of," the Jewish faith, to doubt the validity of such a clause. In *Patton* v. *Toronto General Trusts Corporation* (1), which came before the Privy Council, the phrase used in the will was: "Provided my son Robert "George Patton, now residing at Cologne, Germany, is and "remains up to the date of his death a British subject, and "is and proves himself to be of the Lutheran religion, to pay "to my said son, Robert George Patton, annually for and "during the term of his natural life " the annuity there stated. The same phrase was used in certain other provisions. On the argument which has been addressed to us it would be impossible for anyone to prove himself to be of the Lutheran religion, because the inquiry into a man's religion involves an investigation of matters of degree and so forth which cannot lead to any clear result, and such a phrase as "of the "Lutheran religion " ought to be held to be too vague to be enforced, but it is to be noted that there is not a suggestion from the beginning to the end of that case of any doubt of the validity of the provision on any such ground. The matters which were discussed were totally different.

The clause in *In re May* (2) was: "Provided he [the legatee] "shall not be a Roman Catholic at my death or being a Roman

---

(1) [1930] A. C. 629.

(2) [1932] 1 Ch. 99.

"Catholic at my death shall cease to be a Roman Catholic "before the expiration of twelve calendar months after my "death until he shall after my death become a Roman Catholic" with a gift over on the happening of any of the aforesaid events or of the death of the legatee, whichever should first happen. To ascertain whether the beneficiary was a Roman Catholic within the meaning of that proviso evidence was required and was given, but the idea that the language used did not express a conception sufficiently clear and precise to enable the court to enforce it apparently never entered anybody's head. It is just worth looking at the evidence which was stated to be that (1) "Michael May had all his life been a Roman Catholic, "and that his father, who was Roman Catholic, had caused "him to be brought up in that faith. Michael May in his "affidavit stated that to the best of his belief he had been "baptized by a Roman Catholic priest; also that he had been "confirmed by the Roman Catholic Bishop of Southwark, and "that he had been educated at a Roman Catholic preparatory "school and later on at the Roman Catholic public school, "Downside. He further stated: 'I am and have been all "'my life a Roman Catholic'." Then he claimed that the income still went to him for different reasons. It is noticeable that in the course of his judgment Lord Hanworth M.R., although, of course, he was not dealing with the question of uncertainty, uses language which shows the sense in which he regarded phrases of the kind under consideration. For instance, he says (2): "The accumulations were to continue "and an opportunity was to be given to the young man, at "such an age as the responsibility falls upon him and not "upon others, of determining whether or not his adherence "was definite and sure to the Roman Catholic Church." Then again he says (3): "It is said that he did not become a Roman "Catholic, but in accordance with the terms of the will and "in accordance with the decision of Neville J. he has become "a Roman Catholic, because he became that when the "responsibility for his adherence to the Church fell upon his

---

(1) [1932] 1 Ch. 102.
(2) Ibid. 112.
(3) Ibid. 113.

C. A.
1941
SAMUEL, *In re.*
JACOBS *v.* RAMSDEN.
Lord Greene M.R.

"shoulders and he became, in that sense, a Roman Catholic "'after my death . . . .'" I cannot bring myself to believe that, if the argument that such a provision was void for uncertainty had appeared possible in that case, it would not have been advanced.

Reliance was then placed by the defendant on the decision of Bennett J. in *In re Borwick* (1), where a condition subsequent in a settlement provided that an interest which would otherwise have become vested in a grandchild of the settlor on attaining the age of twenty-one years or (being female) attaining that age or marrying, should be forfeited if the grandchild "shall "at any time before attaining a vested interest under the "trusts hereinbefore declared be or become a Roman Catholic "or not be openly or avowedly Protestant." It was held that that was void as being against public policy, but Bennett J. also held that it was void for uncertainty, not, however, as I read his judgment, because the phrases used with reference to religion were in themselves too vague, but because the ambit of the clause must apply to infants, and, as he observes, "was it possible for a court on August 31, 1910 "[the date of the settlement] to see precisely and distinctly "what facts and circumstances would make it possible to say "of an infant affected by the condition that he had either "become a Roman Catholic or was not openly and avowedly "Protestant?" It is to be noticed that the uncertainty which, so far as the report goes, was argued by counsel in that case arose from the application of the clause to infants, because in the arguments of Mr. Vaisey and Mr. Johnston I find these sentences (2): "It is impossible to predicate of "an infant that he is of a particular religion, especially when "he is to be 'openly and avowedly Protestant . . . .' "Therefore, if not void for uncertainty, the clause is void "because it contains an impossible condition."

There is one more case to which I must refer before I come to the 1940 cases, and that is *In re Tegg* (3), where the condition was: "I desire that my daughter and any children

---

(1) [1933] Ch. 657.
(2) Ibid. 661.
(3) [1936] 2 All E. R. 878.

"she may bear should at all times conform to and be members "of the Established Church of England; and at no time may "any child of hers go to or be sent to any Roman Catholic "school for education; and if either my daughter or her "children violate this my wish in any way then all the benefits "accruing to her or them under this my will shall be considered "as null and void." It is to be observed that the daughter and her children are required to "conform to and be members "of the Established Church of England," and on that language Farwell J. found that the provision was void for uncertainty. He said (1): "In the present case the first condition which "is imposed on this lady is that she herself and her children "are at all times to conform to and be members of the "Established Church of England. It may be—I am not "deciding this—that if the testator had been content to say "'should be members of the Established Church of England,' "that might be a matter of some certainty, but that is not "enough, because the lady and her children must 'at all times "'conform to.' Now, speaking for myself, I do not in the "least know what that means. It seems to me it would be "quite impossible to say, here and now, whether any particular "act or omission would be enough to render this condition "operative. Whether a person, merely because he has been "baptized and confirmed in the Church of England, but "thereafter has ceased to pay any attention to any religious "services at all, can be said to conform to the Established "Church of England, I have not the least idea." The decision, therefore, turned on the phrase "conform to," which the learned judge found to be too uncertain to be enforced. He did so for the reason that I indicated at the beginning of this judgment, that it was a phrase importing of necessity degree and there was no guide to the precise measure of conformity which was required. It is not necessary to discuss whether or not that decision on further examination might be found to be sound. The language of the provision is very different from that used here, and the reason given by the learned judge was based on the special language of that will. I, therefore, express no opinion one way or the other as to that decision.

---

(1) [1936] 2 All E. R. 881.

I now come to the two cases which have really given rise to the present difficulties—*In re Blaiberg's Will Trusts* (1) and *In re Blaiberg* (2). The first decision, which was one of Farwell J., is not reported, but its nature and the relevant language which he used are to be found sufficiently in the report of the later case which came before Morton J. (2). Two different forfeiture clauses were considered in those cases, the clause with which Farwell J. dealt being in a codicil to the will. In it the testator declared that, if any son, daughter, or grandchild of his, or the widow of any son of his, should cease or fail to profess, or intermarry with any person who should not profess, the Jewish faith, there was to be a forfeiture. It is to be observed that the language there is "cease or fail "to profess," and it was on those words that Farwell J. held that the provision was void for uncertainty. The clause with which Morton J. had to deal was contained in another codicil, which was in these terms: "And I do hereby declare that "should any child or grandchild of mine at any time whether "before or after my decease marry any person not of the "Jewish faith, such child or grandchild shall forfeit," and so forth. That language is precisely that which we have here. The only difference between the two cases is that in the present one there is the further reference to "Jewish parentage." Morton J. held, basing himself on the view of Farwell J. in the earlier case, that the phrase "not of the Jewish faith" was too vague to be enforced. While recognizing that the decision of Farwell J. was on different language, Morton J. cited certain passages in his judgment as assisting him in coming to his conclusion. I need only read extracts which Morton J. gives from Farwell J.'s judgment with relation to the construction of the clause which was before Farwell J. Farwell J. said: "It seems to me that the phrase 'cease or fail to profess' is "a term capable of many meanings, and it would be impossible, "in my judgment, in many cases to determine with any "certainty whether a person had or had not ceased or failed

---

(1) Unrep.: Dec. 14, 1938.

(2) [1940] Ch. 385.

"to profess. Whether a person who, while outwardly professing to be a member of the religion, in fact was not a "member of it, would forfeit under this clause, I know not, "and it would, I think, be impossible to ascertain." Morton J. construes that language as follows: "As I read that observation "Farwell J. is saying: It is really impossible to ascertain "whether a person in fact, in his own mind, holds a particular "religious belief. It is not a matter which the courts can "ascertain with certainty." Then he goes on to deal with the clause before him which he finds to be even more uncertain than the clause which had to be construed by Farwell J., and he says (1): "It seems to me that, while 'professing' a faith "may be a matter of outward observance, the question whether "a person is '*of* the Jewish faith' or not is a matter which "lies in his or her own conscience and is a matter of belief. "Supposing, for example, that the marriage had taken place "in a synagogue, to my mind that would not establish that "the other contracting party was of the Jewish faith. In my "view it depends on whether he holds or does not hold certain "beliefs. What are the beliefs which make a man of the "Jewish faith or not of the Jewish faith. I do not know. "It is possible that the court could ascertain that by evidence. "I do not know whether there would be any difference of "opinion among persons called as witnesses to say what are "the beliefs that it is necessary for a man to hold in order "to be of the Jewish faith. But the further question, does a "particular man hold those beliefs, is not, to my mind, a "matter which a court can ascertain with certainty."

I need not repeat what I have already said about the true method of construing the phrase "of the Jewish faith" without reference to subtle distinctions, in a common-sense way, and with particular regard to the avowed religious convictions of the person in question, but I do wish to say a word about the view which Morton J. expressed that the question whether a particular man holds a particular religious belief is a matter which the court cannot ascertain with certainty. With great respect, I should have thought that that matter of fact would

(1) [1940] Ch. 391.

fall to be ascertained in the way that all matters of fact have to be ascertained, namely, by evidence, and when once the meaning of the words in question is ascertained I can see no difficulty in the court inquiring into that matter. There can be no question of such an inquiry being against public policy, and the question whether or not a man is of the Jewish faith, whether his assertion that he adheres to that faith is credible or not, is one which on the evidence no jury should have any difficulty in deciding. I, therefore, must dissent from the view there expressed that that matter is not within the competence of the court to decide. It is to be noted that neither in that case, nor, as we are informed, in the case before Farwell J., was reference made to the earlier cases. Whether that be so or not, it is significant that in neither of these judgments is any reference made to the way in which conditions in restraint of religion (if I may coin such a phrase) had been dealt with in a long line of cases.

Farwell J. had to refer to his own decision in *In re Blaiberg's Will Trusts* (1) and that of Morton J. in *In re Blaiberg* (2) in *In re Evans* (3). There the forfeiture clause referred to a child or grandchild becoming a convert to the Roman Catholic religion. Farwell J. distinguished his earlier decision and held that the clause was valid on the ground that conversion was an overt act which could be ascertained with precision. If conversion, as I apprehend it does, involves, and has as its essential quality, the element of faith, I do not follow how the question whether a man had been converted or not can be settled merely by regarding overt acts. I should have thought that, if there was any time at which a close inquiry into the tenets which a man held and the conviction with which he held them should be made, it would be the moment of conversion which has nothing to do with ceremonial observance but implies a change of faith, and the argument addressed to us would have been equally valid if it had been addressed to Farwell J. on that ground. Farwell J., however, drew that distinction, and he said this with regard to his

---

(1) Unrep.: Dec. 14, 1938.
(2) [1940] Ch. 385.
(3) [1940] Ch. 629.

Lord Greene M.R.

previous decision in *In re Blaiberg's Will Trusts* (1): "The "ground upon which I came to the conclusion which I "did in *In re Blaiberg* (1) [in this report referred to as "*In re Blaiberg's Will Trusts*], and, I think, the ground upon "which Morton J. based his decision, was that there the "forfeiture clause was contemplating a state of mind and that "that was something which the court could not ascertain with "any certainty." There the learned judge is adopting as his own Morton J.'s construction of the reasons which he himself had given in *In re Blaiberg's Will Trusts* (1). He goes on to distinguish that case from the one before him, and he says: "It was not a particular overt act such as definitely accepting "a faith other than your own and renouncing the faith which "you originally held." With all respect to the learned judge I cannot regard conversion as referring merely to definite overt acts. Then he says: "The forfeiture clause in *In re Blaiberg* (1) "contemplated merely that, if a person married someone who "did not profess the Jewish faith, there was to be a forfeiture. "Whether there would be sufficient compliance with the "condition of 'professing the Jewish faith' merely by the "particular person's attending synagogues, or doing other acts "possibly suggestive, but not necessarily conclusive, of his "professing that faith, was so uncertain that there were grounds "there sufficient to render the forfeiture clause invalid. But "in the present case it does not seem to me that that is the "position. A person becoming a convert to the Roman "Catholic faith must do definite acts and must be admitted "into the Roman Catholic Church. Before being admitted "into the Roman Catholic Church, such a person must renounce "the religion which he or she had before." There the learned judge gives rather a different reason for his decision in *In re Blaiberg's Will Trusts* (1) from that which he had given a few sentences above, because he there laid stress, not on the state of mind into which the court could not inquire, but on the impossibility of saying what would be a sufficient compliance with the condition of professing the Jewish faith.

It is not necessary for the purposes of the present case for

---

(1) Unrep.: Dec. 14, 1938.

C. A.
1941
SAMUEL,
In re.
JACOBS
v.
RAMSDEN.

Lord Greene M.R.

this court to say that any of the recent decisions to which I have referred must stand overruled other than the decision of Morton J. in *In re Blaiberg* (1). Farwell J.'s decisions in *In re Blaiberg's Will Trusts* (2) and *In re Evans* (3) (in which the forfeiture clause was held to be valid) were on different language with regard to which different arguments might be addressed to us, and, although those cases have been touched on and the various considerations affecting the language used have been to some extent discussed before us, it would be improper for this court, without hearing full argument on language of the same character, to say that any of those cases was wrongly decided. That question can be decided if and when a will similarly framed comes before this court. But the decision of Morton J., in my opinion, cannot stand with the decision which should be given in the present case, and, in so far as the reasoning of Farwell J. is inconsistent with the reasons which this court considers are the correct ones and agrees with the reasoning of Morton J., it cannot, in my judgment, be supported.

A number of statutes have been cited to us in which phrases occur such as "of the Jewish religion," "profess the Jewish "religion," and so forth. In one Act of Anne we find "Jewish "parents," and in another Act "Jew." To those Acts of Parliament I do not propose to refer in detail. It is perfectly true that the question whether a phrase has a sufficiently clear content must depend on the context in which it is used, but it is significant that the legislature apparently felt no difficulty in adopting for the purposes of the criminal law, among others, and in Acts such as the Factory Acts, expressions which we are now told are so vague that no court could possibly ascertain what they mean. It seems to me that, when it is seen how the legislature has dealt with such religious questions, considerable light is thrown on this argument, which, as I have pointed out, first appeared quite recently.

In the result, the judgment of Bennett J., in my opinion, cannot stand, and an appropriate declaration must be made.

---

(1) [1940] Ch. 385.
(2) Unrep.: Dec. 14, 1938.
(3) [1940] Ch. 629.

Clauson L.J. I agree. The judgment of the Master of the Rolls may, so far as I am concerned, be treated as the judgment of the court.

du Parcq L.J. I agree, and I also am content that the judgment of the Master of the Rolls should stand as the judgment of the court.

Appeal allowed.

Solicitors for the plaintiffs: *Hunt & Hunt.*

Solicitors for the first defendant, a trustee of the will: *Burton & Ramsden.*

Solicitors for other persons interested: *Whitehouse, Gibson & Oldershaw; H. M. Lyell.*

Solicitor for Mrs. Edna Violet Clayton: *L. A. Hart.*

H. C. G.

In re EARL OF FEVERSHAM'S CONTRACT.

MORTON J.

1941 July 30.

Emergency legislation—Power of attorney—Tenant for life—Delegation of powers—Appointment of two attorneys to act jointly and severally—Execution of conveyance by one attorney—Execution of Trusts (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 114), *s.* 1, *sub-s.* 1.

A tenant for life of settled land, in exercise of his powers under the Execution of Trusts (Emergency Provisions) Act, 1939, s. 1, sub-s. 1, by which a "tenant for life . . . . may . . . . delegate to "any person, or to two or more persons jointly, the exercise, during "the whole or any part of (*a*) any period during which he is engaged "on war service; and (*b*) a period of one month thereafter, of any "functions vested in him . . . .," executed a power of attorney appointing his wife and another person, H., "jointly and each of "them severally" to act as his attorneys and to execute any of his powers during the period in which he should be engaged on war service. A purchaser took objection to a proposed conveyance on the ground that it had only been executed by H., and that the power, having been given to two attorneys, must be exercised by both of them jointly:—

Held, that the words "any person" in s. 1, sub-s. 1, of the Act of 1939, must, in accordance with the Interpretation Act, 1889 (52 & 53 Vict. c. 63), include the plural and be read "any person

MORTON J.
1941
EARL OF FEVERSHAM'S CONTRACT, In re.

"or persons"; that the sub-section, therefore, empowered the appointment of two or more persons to act severally as well as jointly; and that the conveyance was properly executed by one attorney.

SUMMONS.

The summons was taken out, under s. 49 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), by the purchasers of an estate belonging to the Earl of Feversham to have decided the question whether or not an objection which they had taken to the title was valid. On January 3, 1940, Lord Feversham, who was an officer in the army, before going overseas on active service, executed a power of attorney under s. 1, sub-s. 1, of the Execution of Trusts (Emergency Provisions) Act, 1939 (1), whereby he appointed his wife, the Countess of Feversham, and Captain T. Hutchinson "jointly and each of them "severally" to execute "the trusts powers and discretions "vested in him as tenant for life" of two settled estates, during such period as he was "on war service as defined in the "Act and one month thereafter." Subsequently, a contract was entered into for the sale of one estate to the National Employers' Mutual General Insurance Association, Ld., and the purchasers took the objection that the conveyance to them had only been executed by Captain Hutchinson and not by both attorneys jointly.

Nesbitt for the purchasers. The delegation was in pursuance of a statutory power which, dealing as it does, with fiduciary duties, must be strictly construed. The Act authorizes a tenant for life to delegate his powers either to a single person or to "two or more persons jointly." If he delegates to two or more persons the powers delegated must be exercised by them jointly. Lord Feversham purported to delegate his powers to both attorneys jointly and severally, but that is in excess of the powers of the Act.

---

(1) Execution of Trusts (Emergency Provisions) Act, 1939, s. 1, sub-s. 1: "Notwithstanding any-"thing in any enactment or any "rule of law or equity, a trustee, "personal representative, tenant "for life or statutory owner may, "subject to the provisions of sub-"section 3 of this section, delegate "to any person, or to two or more "persons jointly, the exercise, "during the whole or any part of "(*a*) any period during which he is "engaged in war service; and (*b*) "a period of one month thereafter, "of any functions vested in him "as such."

Jopling for the vendor. The power is a valid appointment of the two attorneys, and can be exercised by either one of them separately. "Any person" in s. 1, sub-s. 1, of the Act does not mean a single person: see *London and India Dock Co.* v. *Thames Steam Tug and Lighterage Co., Ld.* (1), where the words "any ship" were interpreted to mean "any ship or ships"; it includes any one of two, three, or more persons. The power can, therefore, be exercised by Captain Hutchinson without the concurrence of Lady Feversham. [He referred to the Execution of Trusts (War Facilities) Act, 1914 (5 & 6 Geo. 5, c. 13), s. 1, and the amending Act of 1915 (5 & 6 Geo. 5, c. 70), which extended the earlier Act to tenants for life.] By the Interpretation Act, 1889, s. 1, the singular of any noun in an Act is to include the plural unless a contrary intention appears, and the power to delegate to two or more persons jointly does not imply such a contrary intention: see *In re Clayton's Settled Estates* (2). On any other construction the purpose of the Act would be defeated. [The Trustee Act, 1925 (15 Geo. 5, c. 19), s. 15, was also referred to.]

MORTON J. [after stating the facts:] At first sight it would seem that the vendor's contention is right. Captain Hutchinson is a "person," and he has been appointed by Lord Feversham to exercise powers which would include the execution of the conveyance of these lands. Therefore, prima facie, it would seem that the conveyance is in order. But Mr. Nesbitt, for the purchasers, draws attention to the words in s. 1, sub-s. 1, of the Act "or to two or more persons jointly," and he submits that, as the tenant for life is in the position of a trustee as regards his statutory powers and cannot delegate them unless he is authorized to do so by some statutory enactment, one must scrutinize strictly the terms of the Act to see what powers he is given. He says that the Act is an enabling Act which should be read strictly, and he argues that, in view of the words "or to two or more persons jointly,'

(1) [1909] A. C. 15, 17.

(2) [1926] 1 Ch. 279.

I ought to read the Act as having the effect that two or more persons can jointly be appointed as attorneys for these purposes, but that two or more persons cannot be appointed severally.

I must read the Act in conjunction with the Interpretation Act, 1889, by s. 1 of which it is enacted: "In this Act and "in every Act passed after the year 1850, whether before or "after the commencement of this Act, unless the contrary "intention appears, (*b*) words in the singular shall include the "plural." Unless, therefore, I can find in s. 1, sub-s. 1, of the Execution of Trusts (Emergency Provisions) Act, 1939, a contrary intention, I ought to read the words "any person" as including the plural. Notwithstanding Mr. Nesbitt's argument, I have arrived at the conclusion that I cannot find any contrary intention in the sub-section. In my view, the natural meaning of the words of the sub-section, supplemented by the provisions of the Interpretation Act, is that a tenant for life can select not only one person but several persons if he thinks fit to do so for this purpose, and I do not think that I can give to the subsequent words, "or to two or more "persons jointly," the force which Mr. Nesbitt asks me to place on them. These words may be reasonably explained as intended to remove any doubt which might exist whether the powers could be delegated to two or more persons jointly, and they do not have any effect on the construction which I should otherwise have given to the immediately preceding words, "any person."

I have been referred to the Acts passed for a similar purpose during the war of 1914–1918, namely, s. 1, sub-s. 1, of the Execution of Trusts (War Facilities) Act, 1914, which was supplemented by s. 1 of the Execution of Trusts (War Facilities) Amendment Act, 1915, but I do not think that those Acts afford any real assistance in the consideration of the question now before me.

There is this further observation to be made. The Act of 1939 is an Act intituled, "An Act to facilitate the execution "of trusts during the period of the present emergency." It would clearly be extremely inconvenient if a tenant for life,

MORTON
J.

1941

EARL OF
FEVERSHAM'S
CONTRACT,
In re.

who was contemplating a departure from this country on active service, could only appoint one person, or two or more persons jointly, to exercise his functions. For instance, the sole appointee might die, or one of the two joint appointees might go overseas. I am glad that I do not feel constrained, by anything which I can find in s. 1, sub-s. 1, to give the words such a limited meaning as that contended for by Mr. Nesbitt.

For these reasons I hold that the purchasers' objection to the execution of the conveyance by Captain Hutchinson alone is not well founded.

Solicitors: *Atkey & Son*; *Trower, Still & Keeling.*

H. L. L.

In re GESS.

GESS *v.* ROYAL EXCHANGE ASSURANCE.

MORTON
J.

1941

July 7.

Administration—Intestacy—Distribution of estate—Intestate of foreign nationality—Country occupied by enemy—No known liabilities abroad except certain specified debts—Payment to Custodian of Enemy Property of sum due in respect of specified debts—Need of advertisement for claims abroad.

G., who was of Polish nationality, but whose domicil of choice, at the date of his death, was England, died intestate in England on February 6, 1939. The administrators of his estate were unable, owing to the outbreak of war in September, 1939, and to the occupation of Poland by Germany, to advertise for creditors there, but there were no known liabilities to persons or firms resident or carrying on business in Poland or elsewhere abroad except certain specified debts amounting to 1092*l.* 10*s.*:—

Held, that the administrators, on payment having been made by them to the Custodian of Enemy Property of the 1092*l.* 10*s.*, were at liberty to distribute and deal with the capital and income of the estate without advertising for claims in Poland or elsewhere abroad and without further inquiries whether there were any other debts or liabilities to persons abroad, on the footing that all the debts and liabilities of the estate had been ascertained.

In re Benjamin [1902] 1 Ch. 723 applied.

CHAMBERS SUMMONS (1).

On February 6, 1939, Jakob Gess, who was of Polish nationality, but had acquired, at the time of his death, a domicil of choice in England, died intestate in England. His two sons were the only persons beneficially interested under the intestacy. One of the sons, Karol Norbert Gess, and the defendants, the Royal Exchange Assurance, were the administrators of the estate. The usual statutory advertisement for creditors had been published in this country and all claims made in response thereto had been satisfied, but, owing to the outbreak of war in September, 1939, and the occupation of Poland by Germany, it was impossible to advertise for creditors in Poland. There were no known liabilities to persons or firms resident or carrying on business in Poland or elsewhere abroad except debts amounting to 1092*l.* 10*s.* On May 9, 1941, a summons was taken out by the two sons of the intestate, Karol Norbert Gess and Stephan Lucjan Gess, an infant suing by his brother, K. N. Gess, as his next friend, asking that the administrators might be authorized to pay to the Custodian of Enemy Property a sum sufficient to cover the amount of these liabilities and, subject thereto, to distribute and deal with the estate without advertising for claims in Poland or elsewhere abroad and on the footing that all the debts and liabilities of the estate had been ascertained.

Wilfrid Hunt for the plaintiffs.
Winterbotham for the defendants.

MORTON J. There appears to be no reported precedent for the relief asked, but, in the analogous case where leave is sought to distribute among beneficiaries notwithstanding that a particular beneficiary, or his issue, cannot be traced, leave is frequently given to distribute on the footing that the beneficiary in question has predeceased the testator or intestate or has so predeceased without leaving issue who survived the testator or intestate. This is in accordance with a practice which has been in operation since the decision of Joyce J. in *In re Benjamin* (1) and it would only be following the principle of that decision if its application were extended to debts. Such orders are made, not as of course, but only on satisfactory prima facie evidence of practical impossibility of proof of the fact or event sought to be established. Moreover, if leave to distribute is given, it only operates to protect the personal representative. It does not prevent the missing beneficiary or the absent creditor (if any) from following the assets, which is an equitable and not a legal right, and a remedy devised by the court " by which, where the estate had been " distributed either out of court or in court without regard to " the rights of a creditor, it has allowed the creditor to recover " back what has been paid to the beneficiaries or to the next " of kin who derive title from the deceased testator or " intestate ": per Lord Davey in *Harrison* v. *Kirk* (2), summarizing a long line of authorities. Both on principle and authority, therefore, it is right to accede to the application (3).

---

(1) Reported by leave of the judge on a note prepared by Master Mosse and approved by his Lordship.

Solicitors for all parties : *Stephenson, Harwood & Tatham.*

(1) [1902] 1 Ch. 723.

(2) [1904] A. C. 1, 7.

(3) The operative part of the order as drawn up was as follows :—

And it appearing by the evidence aforesaid that there is due from the estate of the said Jakob Gess the sum of one thousand and ninety-two pounds ten shillings in favour of persons firms or companies in enemy-occupied territory, *And* the plaintiff Karol Norbert Gess and the defendants as the administrators of the said estate by their counsel undertaking to pay the said sum of one thousand and ninety-two pounds ten shillings to the Custodian of Enemy Property in England. *It is ordered* that upon such payment being made the plaintiff Karol Norbert Gess and the defendants be at liberty as such administrators as aforesaid to distribute and deal with the capital and income of the estate of the intestate without advertising for claims in Poland or elsewhere abroad and without further inquiries as to whether there are any further debts or liabilities to persons abroad and on the footing that all the debts and liabilities of the said estate have been ascertained.

J. L. D.

MORTON J.

1941 July 30.

In re FRASER-TAYLOR'S APPLICATION.

Emergency legislation—Mortgage—Appointment of receiver—Alleged breach of covenant to repair—Need to make out prima facie case of right to appoint receiver—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*), *sub-s.* 4.

A mortgagee of house property, having alleged that the mortgagor had committed breaches of covenant by failing to keep the property in repair, applied for leave to enforce the mortgage by the appointment of a receiver. The mortgagor denied that there had been or were any breaches of covenant, and contended that the mortgagee was bound to make out a prima facie case to show that the right to appoint a receiver had arisen:—

Held, that, on this application, the court would not consider whether or not the right to appoint a receiver had arisen.

In re Royal Bank of Scotland's Application [1940] Ch. 857 distinguished.

PROCEDURE SUMMONS.

The summons was taken out by the applicant, Miss Annie Beatrice Irene Fraser-Taylor, who was the mortgagee under a mortgage dated March 20, 1937, and made between Maria Goodman (now Maria Burt), as mortgagor, and the applicant, whereby a legal charge was created over No. 85, Shaftesbury Road, Brighton, and other properties. The mortgage provided that: "The borrower hereby covenants with the lender that "so long as any money remains due hereunder the borrower "or persons claiming under her will keep the said premises "in a good and substantial state of repair." The applicant asked leave from the court under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, to exercise any remedy which was available to her by way of the appointment of a receiver of the property on the ground that the mortgagor had not observed the covenant. The mortgagor said that it did not appear from the summons on what grounds the applicant claimed to be entitled to appoint a receiver, but she understood it to be for breach of the covenant to repair, and she denied that she had committed any breach of covenant.

Raymond Jennings for the applicant. The applicant is entitled to appoint a receiver on the ground that there has been a breach of the covenant to repair, and asks for the leave of the court so to enforce the mortgage. The applicant is not obliged to prove the extent of the failure to repair: see *In re Huddersfield Building Society's Application* (1); *Evans* v. *Horner* (2); and the Practice Note in [1939] W. N. (Misc.), p. 611.

W. F. Waite for the respondent. When the summons was issued the respondent did not know what repairs it was alleged she had failed to perform. The mortgagee is bound to show a prima facie case that there has been a breach of covenant and that the power to appoint a receiver has arisen. The case is analogous to *In re Royal Bank of Scotland's Application* (3), where it was held that it was not sufficient for mortgagees to produce the mortgage and ask for foreclosure on the ground that the date for payment was past, but that they must be in a position to realize their security. The summons should stand over until it is ascertained whether or not the applicant is entitled to appoint a receiver.

Jennings replied.

MORTON J. Mr. Waite, in his argument for the respondent, has raised a question of general importance. He submits that, when a mortgagee asks for leave under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, to proceed to exercise any remedy which is available to him by way of, inter alia, the appointment of a receiver, it is incumbent on him to make out by evidence a prima facie case that the right to appoint a receiver has arisen.

The practice with regard to these applications is set out in a Chancery Practice Direction which was issued by the Chief Master on November 15, 1939 (4). So far as material, it is as follows: "2. In applications under s. 1, sub-ss. 1, 2 "and 3 of the Act, it shall not be necessary in the first instance "to support the application by any affidavit. 3. In applica-"tions under s. 1, sub-s. 2 (*a*), the mortgage deed, debenture "or other document under which the applicant seeks to

(1) [1940] W. N. 247.
(2) [1925] Ch. 177.
(3) [1940] Ch. 857.
(4) [1939] W. N. 611.

"exercise his powers shall be produced to the master and be "entered on his notes and be read in the order. Costs of a "mortgagee will not be assessed or dealt with, the applicant "being left to his ordinary remedy of adding the costs to his "security." That is the practice followed with regard to these applications, but Mr. Waite argues that it is wrong. He submits that the applicant must make out a prima facie case, which he can only do by evidence, that the power to appoint a receiver or the power of sale under the Law of Property Act, 1925 (as the case may be), has arisen. It is manifest that, if the application is not supported by any affidavit and the applicant merely produces his mortgage deed, the court will not be in a position to say whether or not either power has arisen. Mr. Waite pointed out that on an application for leave to institute proceedings for foreclosure, or for sale in lieu of foreclosure, a prima facie case is made out by the production of the mortgage itself showing that the date for payment has expired, but he said, and rightly, that the mere production of the mortgage does not show, one way or the other, whether the statutory power of sale or the statutory power to appoint a receiver has arisen.

In my view, when such an application as the present comes before a master or a judge, the court will not consider whether or not the power to appoint a receiver has arisen, because, if leave is given, it only enables the applicant to proceed to exercise any remedy which is available to him by way of the appointment of a receiver. The giving of leave removes the obstacle which is created by the Courts (Emergency) Powers Act, 1939. If the applicant has such a power, he is then at liberty to exercise it, but the court has in no sense to determine whether or not the power has arisen. If applicants were forced on each occasion to produce evidence that the power had arisen, the result, in view of the number of these applications, would be to impose in the aggregate a very severe burden on mortgagors, whom the Act was intended to protect, because in the ordinary way the costs of the application would be added to the security and would thus be an additional incumbrance on the mortgaged property.

Mr. Waite has referred me to the decision of Bennett J. in *In re Royal Bank of Scotland's Application* (1), where the summons was in an unusual form. The applicants asked that they, having given notice on May 15, 1940, calling in all moneys due to them under or by virtue of an equitable charge, might, on the expiration of three months from May 15, 1940, proceed to exercise all powers or remedies which might be available to them, and, in particular, enter into possession of and sell the property charged. The summons was dated July 9, 1940, and it was thus apparent that the power of sale had not yet arisen. Bennett J. said (2): "Upon the face of "the charge which is the foundation of this application, "the bank are not at the moment in a position to realize the "security, and they will not be in a position to do so until "August 15, 1940 . . . . The relevant date at which the court "is to consider whether a respondent is unable immediately "to perform his obligation must be that at which the person "entitled, but for the Courts (Emergency Powers) Act, 1939, "to exercise some remedy, is in a position to exercise it." He pointed out that the position of the respondent might change between the date when he was hearing the case and August 15, and said: "In my judgment this application made to-day is "on the face of the summons premature." In my view, that decision is no authority for the proposition that the applicant has to make out a prima facie case that the power of sale or the power to appoint a receiver has arisen. It was deliberately and intentionally brought to the notice of the court, in order that the particular question might be decided, that the power of sale had not arisen. In those circumstances Bennett J. thought that it would be premature to deal with the matter. So much for the point of general importance which was raised by Mr. Waite's argument.

I do not think it is necessary for me to travel in detail through the whole of the correspondence and the facts. The mortgage has been produced. The statutory power to appoint a receiver is not excluded. The mortgagee asks leave to exercise any remedy which is available to her by way of the

---

(1) [1940] Ch. 857. (2) [1940] Ch. 858.

MORTON J.
1941
FRASER-TAYLOR'S APPLICATION, *In re.*

appointment of a receiver, and I have to consider whether the mortgagor has put forward in evidence any facts which bring her within the provisions of s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939 (1). The only evidence filed by the mortgagor is as follows : "I am the owner in fee simple "of the property comprised in the above mentioned mortgage. "It is not apparent from the summons in this matter on "what grounds the applicant claims to be entitled to appoint "a receiver, but I understand that she claims that there has "been a breach of the covenant in the said mortgage to keep "the property in good and substantial repair." Then she denies that there has been any breach of the covenant. [His Lordship reviewed the evidence, said that there had been no difficulty in the respondents' ascertaining in what respect it was alleged that she had failed to perform the covenant, and concluded :] If it be the fact that she was prevented from doing any particular repair by circumstances attributable to the war, she would have been in no difficulty in putting in an affidavit to prove that fact. I see no reason why the summons should be adjourned. In my view, the right course is to give the applicant the leave which she seeks, and, if there is any dispute whether or not the power to appoint a receiver has arisen, that must be determined in other proceedings. The applicant shall be at liberty to add her costs to her security.

Solicitors : *E. H. North, for A. Fraser-Taylor & Co., Brighton ; Jennings, Son & Ash, for Gates, McCully & Buckwell, Brighton.*

---

(1) Courts (Emergency Powers) Act, 1932, s. 1, sub-s. 4 : " If, on "any application for such leave as "is required under this section for "the exercise of any of the rights "and remedies mentioned in "sub-ss. 1, 2 and 3 of this "section, the appropriate court is "of opinion that the person liable "to satisfy the judgment or order, "or to pay the rent or other debt, "or to perform the obligation, in "question is unable immediately "to do so by reason of circum-"stances directly or indirectly "attributable to any war in which "his Majesty may be engaged, the "court may refuse leave for the "exercise of that right or remedy, "or give leave therefor subject to "such restrictions and conditions "as the court thinks proper."

H. L. L.

GILLETTE INDUSTRIES, LIMITED *v.* BERNSTEIN.

C. A.
1941
July 24, 25

Patent — Patented articles — Sale — Restrictive condition — Knowledge— Relevant time—Certificate of validity—Grant—Whether prima facie evidence sufficient.

Manufacturers of patented articles brought an action to restrain traders who had bought some of those articles from selling them at less than certain regulated prices prescribed by a restrictive condition. The defendants did not appear at the trial and the plaintiffs, claiming also a certificate of validity, gave prima facie evidence of validity :—

Held, (1.) that it was essential for the plaintiffs to establish that the defendants had knowledge of the restrictive condition at the time they bought the goods ; (2.) that, although the plaintiffs had established that they were entitled to an injunction, a certificate of validity should not be granted.

Where in patent proceedings the question of validity has not been thoroughly investigated the court should exercise with great caution the jurisdiction to grant certificates of validity.

APPEAL from Bennett J.

Gillette Industries, Ld., the plaintiffs, brought actions, which were consolidated, against the defendants Bernstein, Albert and Solomon respectively, to restrain them from selling Gillette razor blades, manufactured by the plaintiffs under their patents, at less than certain regulated prices prescribed by a restrictive condition. The defendants, Albert and Solomon, put in defences which did not admit the acts complained of and disputed the validity of the patents, but these defendants did not appear at the trial. The defendant Bernstein appeared and submitted to judgment. The blades were enclosed by the plaintiffs in packets of five, marked with the price 1*s.* 3*d.* and inscribed with a notice that they " must "not be retailed except under the conditions shown in the "maker's current price list or on the maker's current cartons." The cartons contained twenty packets and bore an inscription stating that they must not be retailed " at a less price than "that shown by the manufacturers on each packet." The evidence did not show when or where the defendants bought the packets which they were proved to have sold retail at less than the price prescribed. Evidence was given from which the inference might be drawn that they knew of the restrictive condition when they bought them. There was also prima facie evidence of the validity of the patent.

Bennett J. in the case of the defendants, Albert and Solomon, refused the relief sought on the ground that the plaintiffs had not established that they knew of the restrictive condition as to price at the relevant time. He also refused to grant a certificate of validity in respect of the patents.

The plaintiffs appealed.

Trevor Watson K.C. and *Marlow* (for *B. Drewe,* on war service) for the plaintiffs. The inference to be drawn from the evidence is that the defendants knew of the restrictive condition when they bought the goods. But even if they did not, such knowledge need not be established, provided knowledge before the resale can be shown : *Columbia Graphophone Co., Ld.* v. *Thoms* (1). This does not create an unreasonable position, since an honest trader who had notice of the condition at any time would consider himself bound by it. The statement of Lord Shaw in *National Phonograph Co. of Australia* v. *Menck* (2), to the effect that a person buying patented goods, knowing of the conditions imposed by the patentee, " which knowledge is clearly brought home to "himself at the time of sale," is bound by that knowledge, must be treated as modified inasmuch as knowledge before resale is sufficient. Further, prima facie evidence of validity having been given, the court should grant a certificate of validity.

The defendants did not appear.

LORD GREENE M.R. [having stated the facts :] The law relating to the obligation of purchasers in regard to patented articles where the patentee has imposed conditions on the user of the article is for present purposes quite clear. Mr. Marlow, on behalf of the plaintiffs, endeavoured to establish the proposition that knowledge of the restrictive condition at the time of the purchase by the defendant of the goods which he subsequently resold in the manner complained of was not essential. Without going into the authorities which have been cited to us, it seems to me to be established that, for a patentee to succeed in a claim of this kind, the burden lies on him to show, in addition to other matters, that the defendant had the restrictive condition brought to his notice when he acquired the goods, and it is not sufficient to show that he obtained knowledge of that condition in the interval between his acquisition of the goods and his disposal of them. That appears to me to be the clear statement of the law to be extracted, not merely from the judgment of the Privy Council delivered by Lord Shaw in *National Phonograph Co. of Australia, Ld.* v. *Menck* (1), but also from the earlier authorities which are referred to in that judgment. Not only is that rule now settled but it also appears to me that none other would be consonant with the principle on which a person who acquires a patented article is affected by restrictions of this kind. I do not wish to say anything more on that subject because I think it undesirable to endeavour to improve by language of my own the clear statements of the law by judges who have preceded me.

---

(1) (1924) 41 R. P. C. 294, 296.

(2) [1911] A. C. 336, 349.

I must, however, mention the decision of Tomlin J. in *Columbia Graphophone Co., Ld.* v. *Thoms* (2), which was referred to by Mr. Marlow as giving some support to the proposition that the time of sale by the defendant is the relevant time. I cannot find in the judgment of Tomlin J. any particle of support for that view. The question in that case was purely one of fact, and when Tomlin J. used the words (3): " First the question of fact as to whether or not "the defendant did, as alleged, sell records under the fixed "prices with knowledge of the condition," it is quite impossible to suppose that he meant that the time of sale by the defendant was the relevant time for knowledge. It is obvious that that question did not there arise, for it cannot be doubted that the learned judge was satisfied that knowledge at the time of acquisition had been established. I only refer to that

(1) [1911] A. C. 336.
(2) 41 R. P. C. 294.
(3) 41 R. P. C. 294, 296.

argument because I think it desirable that any attempt to revive it in future in reliance on that case should be stopped. This is no criticism of Mr. Marlow, who was quite right to bring it to our attention.

The question whether or not there was knowledge in the defendant at the relevant point of time is one of fact which must be resolved in many cases not by direct evidence but by inferences to be drawn from the evidence as a whole. In the present case the learned judge held that the plaintiffs had not proved that the defendants knew of the condition when they acquired the goods. Were it not for certain matters which I am about to mention I should be in entire agreement with that finding. [His Lordship reviewed the evidence relating to the knowledge of the defendants when they bought the goods, and continued:] I am clearly of opinion that on the evidence we ought to give the plaintiffs the relief for which they ask on the first point.

The second point relates to the certificate of validity. In the case of Bernstein, who appeared and submitted to judgment, the learned judge refused the certificate of validity and we cannot interfere with that. It is said in the other two cases that we can interfere because we are allowing the appeal, and are, therefore, in a position ourselves to exercise the statutory jurisdiction. One difficulty in the way of that proposition stands out. Whether it be fatal or not, I do not pause to decide, but the matter on which the plaintiffs have succeeded in this court has nothing to do with the validity of the patent. That matter, although put in issue, has not been debated in any way, and has never really been investigated by this court, nor would it have been relevant to the appeal. Assuming that we have jurisdiction to grant a certificate, I cannot see that we ought to exercise it here. This was a case where the validity of the patents, although put in issue, was never really investigated by the court at the trial. The plaintiffs gave prima facie evidence of validity, and on that the learned judge was invited to grant a certificate. I do not suggest for one moment that it may not be proper in suitable cases to grant a certificate of validity where the

C. A.

1941

GILLETTE INDUSTRIES, LD.
v.
BERNSTEIN.

Lord Greene M.R.

defendants do not appear and the matter is not thrashed out. There may well be cases where the court can properly do that, but, in my judgment, where the matter has not been thoroughly gone into, the jurisdiction to grant certificates of validity should be exercised with great caution. Everyone who has been concerned with patent actions knows the difficulty of dealing with questions of validity unless there is adequate cross-examination of witnesses, adequate argument of any question that arises, and a close scrutiny of the true construction of various specifications. If the court grants a certificate of validity when those matters have not been investigated, it seems to me that it may run the risk of affecting the public in future cases without having sufficient material before it. Every case must depend on its own circumstances, but the court certainly should not feel itself bound, as a matter of practice or custom, to grant a certificate of validity in a case where there has been no effective contest merely on prima facie evidence of validity being given. I need put it no higher than that. In the present case I can see no ground why a certificate of validity should be granted. The result, therefore, is that the appeal fails on that point, but succeeds on the first point.

CLAUSON L.J. I agree. On the first matter I desire to say no more than that I am in complete agreement with the Master of the Rolls. As regards the question of validity, I cannot but be conscious of the fact that a rather loose practice has grown up among the judges of the Chancery Division of being somewhat too ready to grant certificates of validity on ex parte evidence without cross-examination where questions which often may prove to be on investigation of very great difficulty have not been thoroughly canvassed. I say that because I am conscious that there are probably many cases in the Patent Reports in which I myself have been guilty of just that looseness against which we are now giving a warning. It is, of course, not easy for a judge of first instance to depart from a practice, even if he thinks that that practice is open to objection. With those observations of a personal

BIBL. LONDIN

C. A.
1941
Gillette Industries, Ld.
v.
Bernstein.

character I wish to preface my statement that I agree entirely with what has been said by the Master of the Rolls. If I am right in the statement that I have made as to a certain looseness in practice having arisen, I hope that no one will base any criticism of what the Master of the Rolls has said on any action of mine recorded in the reports.

du Parcq L.J. I agree with the order proposed by the Master of the Rolls for the reasons which he gives.

Appeal allowed.

Solicitors: *Bell, Broderick & Gray.*

F. C.

MORTON J.
1941
Oct. 20.

In re GARDNER.

Ex parte OFFICIAL RECEIVER.

Bankruptcy—Order for monthly payments out of salary "during the "bankruptcy"—Discharge—Direction that payments be continued—Validity—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-s.* 2; *s.* 51, *sub-s.* 1.

By an order, dated March 1, 1938, and made under s. 51, sub-s. 1, of the Bankruptcy Act, 1914, it was directed that a portion of the salary of the bankrupt should be paid to the trustee in bankruptcy "during the bankruptcy" that it might be applied in payment of the debts of the bankrupt and that such payments ought to be made until the court should make an order to the contrary. On March 10, 1938, the court granted the debtor an immediate discharge, but directed that the order under s. 51, sub-s. 1, be expressly continued:—

Held, that the words "during the bankruptcy" in the order of March 1, 1938, did not refer to a period which came to an end at the moment at which the bankrupt obtained his discharge and that that part of the order of discharge of March 10, 1938, which expressly continued the operation of the former order was valid and effective.

In re Gold (1891) 8 Morr. 45 and *In re A Debtor* [No. 946 of 1926] [1939] Ch. 489, referred to.

MORTON J.

1941

GARDNER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

SPECIAL CASE stated by the judge of the Burnley county court for the opinion of the High Court pursuant to s. 100, sub-s. 3, of the Bankruptcy Act, 1914.

On February 10, 1938, the court, acting under s. 51, sub-s. 1, of the Bankruptcy Act, 1914 (1), made an order (dated March 1, 1938), the material part of which was as follows: "Whereas "it appears to the court that the bankrupt is an employment "officer and as such is in the enjoyment of the annual salary "of 370*l.*, and whereas upon the application of [the trustee "of the property of the bankrupt] it appears to the court "just and reasonable that the annual sum of 60*l.*, portion of "the said salary, ought to be paid to the said trustee during "the bankruptcy in order that the same may be applied in "payment of the debts of the bankrupt and that such payment "ought to be made out of the first moneys which shall be due "after February 28, 1938, at the rate of 5*l.* each calendar "month and be continued until this court shall make an "order to the contrary: It is ordered with the written "consent of the Director of Services and Establishments . . . . "that such portion of the salary shall be paid to the Trustee "accordingly." On March 10, 1938, the court granted the debtor an immediate discharge, but directed "that the order "made under s. 51, sub-s. 1, dated March 1, 1938, be expressly "continued." On November 23, 1939, the court varied the order of March 1, 1938, by reducing the monthly payments from 5*l.* to 3*l.* 10*s.* and the debtor continued to make payments at the reduced rate. On June 19, 1941, the Official Receiver applied to the judge of the Burnley county court for directions as to the manner in which the sum of 76*l.* 17*s.* 5*d.* in his hands, resulting from those payments, should be dealt with. The county court judge, with the consent of the debtor, agreed to state the facts in the form of a special case for the opinion of the High Court, the questions being (1.) whether that part of the order of discharge of March 10, 1938, expressly continuing the operation of the order made under s. 51, sub-s. 1, of the Act, was valid and effective, and (2.), in case it was held not to be valid, that direction be given as to how the moneys in hand to the credit of the proceedings should be dealt with.

---

(1) Bankruptcy Act, 1914, s. 51, sub-s. 1: "Where a bankrupt is "an officer of the army or navy, "or an officer or clerk or otherwise "employed or engaged in the civil "service of the Crown, the trustee "shall receive for distribution "amongst the creditors so much "of the bankrupt's pay or salary "as the court, on the application "of the trustee, with the consent "of the chief officer of the department under which the pay or "salary is enjoyed, may direct."

Aronson for the Official Receiver. In 1938 a similar question relating to an order made under s. 52, sub-s. 2, of the Act came before Mr. Registrar Parton. In that case the bankrupt contended that the words "during the bankruptcy" meant "while the bankrupt remained undischarged," and the registrar decided that the bankrupt was not under an obligation to pay. The decision stood on that point although there was an appeal on another: *In re A Debtor* [No. 946 of 1926] (1). Great confusion has arisen among official receivers as to what they ought to do when payments are made to them by persons who are no longer bankrupt. This special case has, therefore, been stated to obtain a decision of the court on this question. The practice was discussed by Vaughan Williams J. in *In re Gold* (2). [He also referred to *In re Landau* (3) and *In re Garrett* (4); and (as to the position of a married woman) to *In re Wheeler's Settlement Trusts* (5).] The words "during the "bankruptcy" do not merely refer to a period which comes to an end when the bankrupt obtains his discharge: see *In re A Debtor* [No. 946 of 1926] (6).

P. M. Oliver for the debtor. The words "during the "bankruptcy" are usually inserted in orders under s. 51, sub-s. 1, but it is not necessary to insert them. The words being unnecessary, the obligation of the debtor is limited by the order to a period short of that under which he might be obliged to pay as the result of another order. It is not contended that an order cannot be made under s. 51, sub-s. 1, continuing the payments after the discharge of the bankrupt, but when the words " during the bankruptcy " are introduced it is shown that the court intends to impose some limitation. Bankruptcy, as a period, must be different from the period covered by the jurisdiction of the court or of the proceedings in bankruptcy. Under s. 26, sub-s. 2, of the Act a report is ordered "during the proceedings under the bankruptcy." That implies that those words mean something different from the period of bankruptcy. The order should have been amended by striking out the words "during the bankruptcy" and by stating that the payment was to be made during the continuance of the order. The order has come to an end and cannot be continued without an amendment.

---

(1) [1939] Ch. 489.
(2) (1891) 8 Morr. 45, 48.
(3) [1934] Ch. 549, 552.
(4) [1930] 2 Ch. 137.
(5) [1899] 2 Ch. 717.
(6) [1939] Ch. 489, 501.

Aronson replied.

MORTON J. stated the facts and, referring to the order of March 1, 1938, said: The words "during the bankruptcy" and "until this court shall make an order to the contrary" occur in the recital to the order, the operative part of the order being: "It is ordered with the written consent of the "Director of Services and Establishments . . . . that such "portion of the salary shall be paid to the trustee accordingly." I think that the word "accordingly" refers to the preceding part of the order and that the effect of the order is that payment is to be made "during the bankruptcy" and "until this " court shall make an order to the contrary." [After stating the further facts as set out his Lordship continued :] Mr. Aronson, who appears for the Official Receiver, has told me something of the history leading up to this case. He tells me that in consequence of a case decided in 1891, to which I must refer later, orders made under s. 53, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and subsequently under s. 51 of the Bankruptcy Act, 1914, have usually directed that payments should be made during the bankruptcy. He also tells me that it has been usual since 1891, if it was thought that the payments should continue after the discharge, so to direct either at the time the discharge was granted or by separate order. In 1938, however, a case came before Mr. Registrar Parton, to which I must also refer later, and in that case the bankrupt refused to make payments after he had been granted his discharge. As will appear later, the facts in that case were not identical with those in the present case. Mr. Registrar Parton gave a decision in that case which has led to certain doubts arising in the minds of trustees in bankruptcy all over the country as to what is the precise position, and it is with a view to having those doubts resolved that the special case now before me has been stated. Mr. Aronson says that the Board of Trade have no complaint against the debtor in the present case. He has behaved with perfect propriety throughout his bankruptcy, and this is a test case. In those circumstances the Board of Trade have undertaken to pay the debtor's costs both here and in the county court, whatever may be the result of these proceedings.

The first case to which I was referred was *In re Gold* (1). The facts were as follows: A receiving order was made against the debtor on December 18, 1888, on which he was adjudicated bankrupt on February 25, 1889. On March 15, 1889, an order was made by the county court registrar, under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, that the bankrupt should set aside, out of his salary of 400*l.* a year as a clerk, the sum of 48*l.* yearly to be paid by instalments of 4*l.* a month to the trustee during the bankruptcy, such payments to be continued monthly until further order. On July 19, 1889, the bankrupt's order of discharge was granted by the county court judge, subject to a suspension of nine months from the date of the application for certain offences under s. 28 of the Bankruptcy Act, 1883. It is to be observed that in that case there was no express proviso in the order for discharge as to the continuation of the payment of the monthly instalments. The discharge took effect as from March 7, 1890, and up to that date the bankrupt paid the 4*l.* a month, but he subsequently refused to do so. On May 14, 1890, application was made to the county court judge for the committal of the bankrupt for non-payment under the order of March 15, 1889. This application was refused and there was no appeal from the decision of the county court judge, but on September 26, 1890, the application was renewed, and an order was then made by the judge declaring that the debtor was still liable to continue the payments. From that order the debtor appealed, and the appeal was allowed on grounds to which I need not refer in detail, but in his judgment Vaughan Williams J. said: "I want also to make one more observation about the argument "that was addressed to us by Mr. Mackenzie, it is the same "argument that he adduced before the learned county court "judge, and I have it here on a note before me. He "suggests that the order of discharge had no effect, because "prima facie the whole of the salary or income is property "which vests in the trustee, and that that is in the instance "of salary or income subject to the control of the court "to say how much is to be set aside. If that means that "where a man is in receipt of income at the time of his "bankruptcy, after his discharge his income continues to be "vested in the trustee, all I can say is that I entirely dissent "from any such proposition, and I do not understand on what "it is based. When you speak of the whole of his income, it "is only the whole of his income up to the time of his discharge. "Apart from any order of the court which has ordered the "bankrupt to pay over a portion of his income notwithstanding "the discharge, the income I think does not vest in the trustee "in any way."

---

(1) 8 Morr. 45.

It is admitted by Mr. Aronson in the present case that, subject to any order which may be made under s. 51 or s. 26, sub-s. 2, the salary payable to the bankrupt in respect of the period after his discharge does not vest in the trustee in bankruptcy. It is, I understand, in consequence of the concluding sentence of Vaughan Williams J.'s judgment that the practice to which I have referred has been followed.

The decision of Mr. Registrar Parton was given on July 6, 1938. The facts were not precisely similar to those in the present case. On December 15, 1936, the bankrupt having been adjudicated bankrupt on September 23, 1926, it was ordered that his discharge be suspended for six months and that he be discharged as from June 15, 1937, without prejudice to any application or order made or to be made under s. 51,

MORTON J.

1941

GARDNER, *In re.*

OFFICIAL RECEIVER, *Ex parte.*

sub-s. 2, and on December 17, 1936, by order of that date, after reciting that it appeared to the court that the bankrupt was in receipt of net earnings and salary amounting to at least 2500*l.* per annum from his employment as a musician and that it appeared to the court just and reasonable that the annual sum of 312*l.*, a portion of the salary of the bankrupt, ought to be paid to the Official Receiver as trustee by monthly payments of 26*l.* during the bankruptcy that the same might be applied in payment of his debts and that the first of such payments ought to be made on December 26, 1936, and be continued monthly until the court should make order to the contrary, it was ordered that the said sum should be paid by the bankrupt in manner aforesaid out of his salary. Mr. Registrar Parton expressed the view in his judgment that "the words ' during the bankruptcy,' although on their literal "interpretation they cover the whole period whilst a bankruptcy "subsists, namely, until payment of all debts in full, or "annulment or possibly collection of all possible assets and "declaration of a final dividend [he referred to s. 26, sub-s. 9, "of the Act] must, on the context, when occurring in an order "under s. 51, sub-s. 2, be read as during the bankruptcy whilst "the bankrupt remains undischarged." He added: "It "follows from what I have said that the order made under "s. 51, sub-s. 2, on December 17, 1936, was effective and binding "on the bankrupt until the period of the suspension of his "discharge ran out, but the court had no power to continue "such order after that time, as it purported to do. The order, "however, is still in force, and it seems to me will continue "in force unless and until it is revoked or altered by an order "of the court, made in court and not in chambers, on the "application of the respondent or the Official Receiver."

There was no appeal from that decision by Mr. Registrar Parton, but on an application by the Official Receiver for a rehearing of the application for a discharge and a variation of the order of discharge the registrar directed a rehearing and at the rehearing varied the order of discharge by making it subject to a condition for payment of an annual sum (later to be increased) to the Official Receiver for distribution among

MORTON J.

1941

GARDNER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

"the creditors in the bankruptcy" until they had received 10*s.* in the pound. There was an appeal from that order and the appeal was dismissed (1). In the course of his judgment Sir Wilfrid Greene M.R. said this, and I regard the observation as having an important bearing on the present case (2): "The court had jurisdiction in bankruptcy under the Act; "the order of discharge did not take away the jurisdiction of "the court in Bankruptcy, because admittedly the discharge "of the bankrupt does not put an end to the bankruptcy "regarded as a series of judicial and administrative acts and "rights and powers." Clauson L.J., who agreed, said (3): "I should only wish just to add this caution. There was no "appeal from the judgment of Mr. Registrar Parton, which "was delivered on July 6, 1938, and this case of course has "been argued, and has had to be argued in this court, on the "footing that that decision was correct. It is not for us to "express, as there is no appeal, any view about it, but I "think it is only right, as an assistance to those who have "to administer the Act, to point out that any court which "has to consider a similar problem in the light of Mr. Registrar "Parton's judgment of July 6, 1938, will not be able to "consider the problem without having regard to the reasons "for the present judgment which have been expressed by the "Master of the Rolls." I think it is possible, although this is only conjecture, that, in saying this, Clauson L.J. had in mind, possibly among other passages in the judgment of the Master of the Rolls, the passage which I have just read.

I must now refer to s. 51, sub-s. 1, of the Act under which the order of February 10, 1938, in the present case was made. [His Lordship read the sub-section and continued:] Sect. 26, sub-s. 2, which deals with the discharge of the bankrupt, is in the following terms: "On the hearing of the application "the court shall take into consideration a report of the official "receiver as to the bankrupt's conduct and affairs (including "a report as to the bankrupt's conduct during the proceedings "under his bankruptcy), and may either grant or refuse an

---

(1) [1939] Ch. 489.

(2) Ibid. 501.

(3) Ibid. 504.

"absolute order of discharge, or suspend the operation of the "order for a specified time, or grant an order of discharge "subject to any conditions with respect to any earnings or "income which may afterwards become due to the bankrupt, "or with respect to his after-acquired property . . . ." It is plain that under the latter sub-section conditions may be imposed with respect to property which, apart from the imposition of any such condition, would not vest in the trustee in bankruptcy. Sect. 18 of the Bankruptcy Act, 1914, provides that on the adjudication of a debtor the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee, but it is common ground that the property so vested, apart from any order of the court, does not include salary payable to the bankrupt after he has obtained his discharge. There are two other sub-sections of s. 26 to which I should refer. Sub-s. 8 provides: "The powers of suspending "and of attaching conditions to a bankrupt's discharge may "be exercised concurrently"; and by sub-s. 9: "A discharged "bankrupt shall, notwithstanding his discharge, give such "assistance as the trustee may require in the realisation and "distribution of such of his property as is vested in the trustee, "and if he fails to do so he shall be guilty of a contempt of "court." There is no doubt that, even though a bankrupt has been discharged, the trustee continues as a trustee, and he has duties to perform in regard to which under that sub-section he can require the assistance of the discharged bankrupt, and, as the Master of the Rolls said, "the discharge "of the bankrupt does not put an end to the bankruptcy "regarded as a series of judicial and administrative acts and "rights and powers."

I must consider first whether money, which never became the property of the trustee under s. 18 of the Act, can be the subject of an order under s. 51. In my view, this question is concluded by the decisions in *In re Landau* (1) and *In re Garrett* (2), which establish that money which does not become vested in the trustee under s. 18 can be the subject of an order under s. 51. In the first of these two cases, where the

(1) [1934] Ch. 549, 552.

(2) [1930] 2 Ch. 137.

money in question was income payable to a wife by a husband under a consent order of the Divorce Court, Lord Hanworth M.R. said, in dealing with an argument by Mr. Tindale Davis: "He [Mr. Davis] says that, reading s. 51 in the light of that "definition of 'property' [the definition in s. 167 of the "Bankruptcy Act, 1914] and s. 38, unless this income or "salary is 'property' within s. 38, no order can be made "whether under s. 51, sub-s. 1 or sub-s. 2. Now it is to be "observed upon that argument that if that condition to the "operation of s. 51 is to prevail, it would seem that much of "the import of s. 51 is cut away; for, if what is to be dealt "with under s. 51 is only such periodical payments as have "already under the term 'property' become within the "control of the trustee, then it would seem that the power "given by s. 51 is narrowed and limited to a very small extent. "By reason of the authorities, to which I will refer in a "moment, I cannot accept the view that s. 51 is controlled "and limited by s. 38." In the second case Farwell J. had to consider whether the court could make an order under s. 51, sub-s. 2, in respect of a pension received by a retired detective-inspector of the City of London Police Force. After finding that the effect of certain provisions was that when a police officer became bankrupt his pension was not affected and did not vest in the trustee, the learned judge continued: "But when I come to s. 51, sub-s. 2, different considerations "apply. That sub-section empowers the court to direct that "the whole or part of a bankrupt's pension, if it thinks just, "shall be paid to the trustee for the benefit of the bankrupt's "creditors. The sub-section applies both to property that "vests in the trustee under s. 18, sub-s. 1, and also to property "not so vesting." These decisions seem to me to make it plain that the orders made under s. 51 need not be limited to property vested in the trustee under the other provisions of the Act.

I must next consider what is the meaning of the words "during the bankruptcy" in the order of March 1, 1938, which was continued by the order of March 10, 1938. I think it is plain that when the latter order directs the former order to be continued it imports that the payments are to be continued during the bankruptcy or until further order. In my judgment, the true construction of the words "during the "bankruptcy" is not that which was attributed to those words by Mr. Registrar Parton in his decision of July 6, 1938. As I have said, the facts in the two cases are not identical, and I am dealing now with the construction of these words in the order which is before me. In my view, having regard to the fact that, as was said by the Master of the Rolls in the case of *In re A Debtor* [No. 946 of 1926] (1), "the discharge "of the bankrupt does not put an end to the bankruptcy," it would not be right for me to hold that the words "during "the bankruptcy" refer to a period which comes to an end when the bankrupt obtains his discharge. I see no reason for limiting the words in that way, on the wording of the order of March 1, 1938. I asked Mr. Aronson in the course of the argument how long, in his submission, a bankruptcy did in fact continue and whether the words "during the bankruptcy" referred to some period longer than the period ending with the discharge of the debtor. He suggested that he need not attempt, in the present case, to put forward an exhaustive list of the events which may put an end to a bankruptcy, but he submitted that a bankruptcy would clearly come to an end if it were annulled, or if the debts were paid in full, or if a scheme or composition under s. 21 of the Act were accepted by the creditors and approved by the court.

I do not think it is necessary that I should go into that matter any further. If the words "during the bankruptcy" in the order of March 1, 1938, do not refer to a period ending with the debtor's discharge, the order of March 10, 1938, which continues the operation of the previous order, is valid and effective, although, may be, it was unnecessary to insert an express provision for such continuance. On the other hand if, contrary to my view, the words "during the "bankruptcy" in the order of March 1, 1938, referred only to the period which ended with the discharge of the debtor, I think that the true view of the order of March 10, 1938,

(1) [1939] Ch. 489, 501.

must be that the court imposed a condition to the discharge of the bankrupt under s. 26, sub-s. 2, that, notwithstanding the period limited by the order of March 1, 1938, had come to an end, the provisions contained in the order of March 1, 1938, should continue to be in operation and the same portion of the debtor's salary to be paid to the trustee. On either view of the matter, I reach the conclusion that the answer to the first question is that "that part of the order of discharge "of March 10, 1938, which expressly continues the operation "of the order under s. 51, sub-s. 1, made on March 1, 1938, "is valid and effective." That being so, the second question raised by the special case does not arise.

Solicitors: *The Solicitor, Board of Trade; Bracewell & Leaver, for J. K. Currie, Burnley.*

J. L. D.

In re MIDLAND BANK, LIMITED'S APPLICATION. (WALLER'S TRUSTEE IN BANKRUPTCY.)

1941
Oct. 21.

Emergency legislation—Mortgage—Bankrupt mortgagor — Trustee in bankruptcy—Summons by mortgagor for leave to appoint receiver—Trustee not a "person liable to . . . . perform the obligation " . . . ."—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 4.

Where, after a trustee in the bankruptcy of a mortgagor has been appointed, the mortgagee applies under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, for leave to appoint a receiver of the mortgaged property, the trustee is the only proper respondent to the application, as no right is sought to be enforced against the mortgagor personally or against property to which the mortgagor is entitled. The court has no jurisdiction to grant relief under the sub-section to the trustee who is not the "person "liable to . . . . perform the obligation, ..." within the meaning of s. 1, sub-s. 4, of the Act, and in such a case there is no "obligation" within that sub-section.

National Provincial Bank, Ld. v. *Liddiard* [1941] Ch. 158; *In re Midland Bank, Ld.* [1941] Ch. 350, and *Hinckley and South Leicestershire Permanent Building Society* v. *Freeman* [1941] Ch. 32, considered.

UTHWATT J.

1941

MIDLAND BANK, LD.'S APPLICATION, *In re.*

PROCEDURE SUMMONS.

By this summons Midland Bank, Ld. asked, under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, that it might proceed to exercise any remedy which was available to it by way of the appointment of a receiver of property comprised in four mortgages, all dated October 18, 1938, and executed by the mortgagor, Mrs. Mary Elizabeth Cecilia Waller, the bank being mortgagee. In 1941, a receiving order and an order for adjudication were made against the mortgagor, and on March 21, 1941, the Board of Trade certified the appointment of her trustee in bankruptcy. The trustee, as respondent to the summons, opposed the bank's application, and gave evidence by affidavit that the mortgagor, owing to the effect of the war on her business, had been compelled to close it and that her income from it had entirely disappeared. The summons gave rise to the question whether the trustee could seek relief under s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939 (1).

Richmount for the bank. The trustee is not entitled to relief under the sub-section. He is not a "person liable "to . . . . perform the obligation," within s. 1, sub-s. 4, for he cannot be sued and made liable under the covenant to pay the mortgage debt. In *National Provincial Bank, Ld.* v. *Liddiard* (2) and *In re Midland Bank, Ld.'s Application* (3), it was held that only the "person liable to . . . . perform the "obligation" (i.e., the person who can be sued on the mortgagor's covenant to pay) could plead the benefit of s. 1, sub-s. 4. The mortgagor is a bankrupt and, therefore, she is not liable under the covenant, and the bank could not sue her on it: see Bankruptcy Act, 1914, s. 7. The trustee's interest arises only because the equity of redemption is vested in him by virtue of the Bankruptcy Act, 1914. He was made a party to this summons because the Courts (Emergency Powers) Act, 1939, requires that the person against whom relief is sought should be a respondent and also because, since the decision in *Kerrick* v. *Saffery* (1), it has been held that foreclosure proceedings in respect of the mortgaged property of a bankrupt must be against the trustee in bankruptcy and not against the bankrupt: but although he must be made a respondent to an application of this kind, he is not entitled to relief under the sub-section, as he is not "liable to . . . . "perform the obligation."

---

(1) By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 4: "If, on any application for such "leave as is required under this "section for the exercise of any "of the rights and remedies "mentioned in sub-sections (1.), "(2.) and (3.) of this section, the "appropriate court is of opinion "that the person liable to . . . . "perform the obligation, in "question, is unable immediately "to do so by reason of circum- "stances directly or indirectly "attributable to any war in which "His Majesty may be engaged, the "court may refuse leave for the "exercise of that right or remedy, "or give leave therefor subject to "such restrictions and conditions "as the court thinks proper."

(2) [1941] Ch. 158.

(3) [1941] Ch. 350.

W. A. L. Raeburn for the trustee. The trustee is clearly the proper respondent to this application, for the mortgagor is bankrupt and the equity of redemption is vested in the trustee. In *In re Abbey Road Building Society's Application* (2) Morton J. inferred that the trustee would have been entitled to be heard in opposition, had he not in fact consented to the application. In the present case, the trustee represents the general body of creditors interested in the equity of redemption, and ought on principle to be heard in opposition to the application.

UTHWATT J. [after stating the facts:] I have to decide whether I have jurisdiction to exercise the discretion conferred by s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939. The first three sub-sections specify the various cases in which the person who wishes to enforce rights must apply to the court for leave to do so. Sect. 1, sub-s. 4, is the only provision in the Act which lays down any principle on which the court is to act when the application comes before it. Under it, the person to whose affairs attention is to be directed is he who is liable to satisfy the judgment, pay the debt, or perform the obligation in question.

The position in law of the mortgagor and the trustee in bankruptcy is quite clear. The effect of the bankruptcy proceedings is that no action to recover the debt can be taken against the mortgagor and, on an order for discharge being made, the bankrupt will be released from the debt whether it has been proved or not. The trustee in bankruptcy is in no way personally liable for any part of the mortgage debt, but the equity of redemption in the mortgaged property is vested in him. It is clear to my mind that the mortgagor is not a necessary or proper party to these proceedings, for no right is sought to be enforced against her personally or against property to which she is entitled. The trustee is the only person who in law has an interest in the matter, and he is the only proper respondent.

---

(1) (1835) 7 Sim. 317.

(2) [1940] Ch. 239.

The question which I have to decide is whether, in these circumstances, there is a person who, within the meaning of sub-s. 4, is "liable . . . . to pay the . . . . debt, or to "perform the obligation, in question." In my opinion, the answer is in the negative. There is in this case no "obligation "in question." The point is, I think, covered by the construction given to the sub-section in *National Provincial Bank, Ld.* v. *Liddiard* (1), and *In re Midland Bank, Ld.* (2), and I need not go over the same ground again. A similar point arises where the mortgagor has assigned the equity of redemption and proceedings are taken against the assignee to enforce the security, for the assignee is not liable to the mortgagee in respect of any obligation sought to be enforced.

It is unfortunate that, where the trustee in bankruptcy, or an assignee of the mortgagor, is the person interested in the mortgaged property, the court has no jurisdiction to grant relief under the sub-section at their instance. Its power in the matter appears to be confined to the inherent power of the court referred to by Farwell J. in *Hinckley and South Leicestershire Permanent Building Society* v. *Freeman* (3). I need not, however, consider any exercise of this inherent power in the present case, as the bank has taken the proper course of limiting its application at this stage to asking for the appointment of a receiver. I will give the bank leave to exercise such powers as it may have with respect to the appointment of a receiver, on the footing that the receiver's powers are to be confined to those vested in receivers by the Law of Property Act, 1925, the bank to be at liberty to give directions to the receiver pursuant to s. 109, sub-s. 8 (v.), of the Act. Subject to that, I will adjourn the application, the bank being at liberty to apply to exercise any other remedies which it may have. The bank will add the costs of this application to its security.

---

(1) [1941] Ch. 158.
(2) [1941] Ch. 350.
(3) [1941] Ch. 32.

UTHWATT J.
1941
MIDLAND BANK, LD.'S APPLICATION, *In re.*

Solicitors: *Candler, Sykes & Dore, for Leonard Gray & Co., Chelmsford; M. A. Jacobs & Sons.*

K. R. A. H.

In re MIDDLESEX BRICK COMPANY, LIMITED.

SIMONDS J.
1941
Oct. 27.

Emergency legislation — Company — Compulsory winding-up — Debt incurred after outbreak of war—Jurisdiction of court to stay proceedings—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 5.

By s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1939: "Where . . . . a winding-up petition has been presented against "any company on the ground that it is unable to pay its debts, "and the . . . . company proves to the satisfaction of the court "having jurisdiction in the . . . . winding-up that . . . . its "inability to pay . . . . its debts is due to circumstances directly "or indirectly attributable to any war in which His Majesty "is engaged, the court may at any time stay the proceedings "under the petition for such time and subject to such conditions "as the court thinks fit."

Jurisdiction to grant relief under the sub-section is not confined to cases where a company against which a winding-up petition has been presented is liable in respect of a contract made before the commencement of the Act and, accordingly, where it is proved that the company is unable to pay its debts, no matter when contracted, owing to circumstances attributable to war, the court has such jurisdiction.

PETITION.

Middlesex Brick Co., Ld., carried on the business of brick manufacturing. On June 1, 1940, part of its land was

SIMONDS J.

1941

MIDDLESEX BRICK CO., *In re.*

requisitioned by the government for purposes connected with the state of war then existing, and this seriously hampered it in its business. In and after September, 1940, it incurred debts amounting to 4239*l.* for fuel supplied by William Cory & Son, Ld., the petitioning creditors, who, on August 26, 1941, brought an action to recover this sum. At the time of the service of the writ a notice to the effect of Form No. 10 with a form of counter-notice attached thereto to the effect of Form No. 11 was also served on the company pursuant to the Courts (Emergency Powers) (No. 1) Rules, 1941, r. 5, sub-r. 1. The company did not, however, file a counter-notice to the effect that it desired to avail itself of the protection afforded by the Courts (Emergency Powers) Acts, 1939 and 1940. On September 9, 1941, judgment was entered in default of appearance. The petitioning creditors then filed a petition for the compulsory winding up of the company. The company now claimed relief under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 5.

Cecil Turner for the petitioning creditors. The company did not take advantage of the Courts (Emergency Powers) Acts in the proceedings in which judgment was recovered against it and it is not entitled to do so now. It seeks to rely on s. 1, sub-s. 5, of the Act of 1939, but the preceding sub-sections are expressed not to apply to the case of liability under "a contract made after the commencement of this Act," i.e., September, 1939, and sub-s. 5 must be interpreted as also having that limitation. The liabilities in question here were incurred in and after September, 1940, not only after the commencement of the Act but also after the requisitioning of the company's land. The court, therefore, has no jurisdiction to grant relief. Even if it had, this would not be a proper case in which to exercise its discretion in the company's favour.

Wynn Parry K.C. and *T. D. D. Divine* for the company. There was no need for the company to claim the protection of the Acts at the time of the action. It is now entitled to rely on sub-s. 5, the words of which are plainly not limited to the case of debts incurred before the commencement of the Act. The preceding sub-sections stand by themselves. It is to be noted that sub-s. 4 contains provisions complementary to the first three. The view now contended for was that expressed by Uthwatt J. in *In re Romano's, Ld.* (1). Under sub-s. 5 the court has a separate jurisdiction which gives it complete discretion to stay these proceedings.

Turner in reply. The company must show that its inability to pay was due to circumstances arising after the debts were incurred whereas it relies on the previous requisitioning of its land. He also referred to s. 3 (*b*) of the Act.

SIMONDS J. The first question which I have to determine is whether I have jurisdiction to grant the relief claimed by the company under s. 1, sub-s. 5, of the Courts (Emergency Powers) Act, 1939, if I think fit to do so. That sub-section finds its place in a section, the earlier sub-sections of which deal only with a liability accruing in respect of contracts made before the commencement of the Act, and it is argued by counsel for the creditors that for that reason I must give effect to sub-s. 5 as if it also dealt only with such liabilities. In my judgment, the language of the sub-section is too plain for me to adopt that contention. It is comprehensive and refers to an inability to pay debts without any regard to the time at which, or the manner in which, they were incurred. I must, therefore, come to the conclusion that the court has jurisdiction to grant relief in any case in which it is proved that the company which it is sought to wind up is unable to pay its debts owing to "circumstances directly or indirectly attributable to any "war in which His Majesty is engaged." I understand that that is the view which Uthwatt J. expressed in *In re Romano's, Ld.* (1), and I come independently to the same conclusion.

Having, then, jurisdiction to give relief under the sub-section, I have to consider whether this is a case in which, in the exercise of my discretion, I should do so. A somewhat strong point is taken that the debt here was incurred by the company after the date at which the warlike event, if I may so describe it, of requisitioning by the government had occurred, but, reviewing the circumstances as a whole, I think that the company is entitled to say that, but for the war, it would have been able to pay any debt due to the petitioning creditors which it had incurred. That being so, this seems to me to be a proper case in which I may exercise my discretion in favour of the company.

---

(1) (1941) Unrep.

Solicitors: *E. F. Turner & Sons; Trower, Still & Keeling.*

F. C.

In re TANKARD. TANKARD *v.* MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED.

UTHWATT J.

1941

July 15, 16, 21, 22 ; Nov. 5.

Administration — Debts — Payment — Duty of executor — "Due "diligence"—Onus of proof.

There is no rule of law that it is the duty of executors to pay the debts of the testator within a year from his death. Apart from any provisions contained in the will which expressly or impliedly deal with the payment of debts, it is the duty of executors as a matter of the due administration of the estate, to pay the debts of the testator with due diligence, having regard to the assets in their hands which are properly applicable for the purpose. In determining whether due diligence has been shown regard must be had to all the circumstances of the case. Due diligence may require that payment be made before the expiration of the year, but the circumstances affecting the estate and the assets comprised in it may justify non-payment within the year. If, however, debts are not paid within the year, the onus is thrown on the executors to justify the delay.

The duty to act with due diligence is owed not only to the creditors but also to the beneficiaries, for the ultimate object of the administration of an estate is to place the beneficiaries in possession of their interest and that cannot be fully achieved unless all debts are satisfied. As against creditors, the provisions of the will which relate to the realization of the assets or otherwise bear on the payment of debts are irrelevant. Beneficiaries, however, take their interest under the will only on the terms of the will, and, as respects them, full effect has to be given to any provisions which, either expressly or impliedly, modify the executors' duty to pay debts with due diligence. Thus, a power to retain assets in the form of existing investments may be exercisable notwithstanding that debts of the testator were outstanding and that there was not sufficient cash in hand to meet them.

The duty to act with due diligence applies to a debt whether or not it bears interest. If the court is satisfied that there has been a breach of the duty, it can make a declaration as to the breach and direct an inquiry as to damages.

Grayburn v. *Clarkson* (1868) L. R. 3 Ch. 605, applied.

WITNESS ACTION.

By his will, dated July 11, 1938, George Edgar Tankard appointed Midland Bank Executor and Trustee Co., Ld., a subsidiary company of Midland Bank, Ld., to be the executor and trustee of his will. He gave, devised and bequeathed his residuary estate to the company on trust for conversion,

UTHWATT J.
1941
TANKARD, *In re.*
TANKARD *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO.

and, after payment of his debts, funeral and testamentary expenses, he directed the company to hold the balance on the trusts mentioned in the will. The will also provided: "I "empower the company to retain any part or parts of my "estate in the form of investment existing at the time of my "death for so long as the company in its absolute discretion "may think fit without being responsible for any loss occasioned "thereby." The testator died on September 21, 1938, and, at the date of his death, there was owing to Midland Bank, Ld., the sum of 9147*l.* 9*s.* 9*d.* To discharge this debt the company from time to time sold certain shares in Prices Trust Co., Ld., between the date of the death of the testator and January, 1940, the debt not being finally discharged until March, 1940. During the year ending September 21, 1939, the value of the shares in Prices Trust Co., Ld., was at one time 40*s.* 6*d.* a share, and it never fell below 25*s.* 3*d.* a share. The value of the shares at the dates of various sales by the company after September 21, 1939, was approximately 20*s.* a share. A substantial number of the shares were sold within a month of that date.

The beneficiaries under the will began this action against the company, claiming damages for a devastavit, and seeking to have the estate administered by the court. By para. 14 of the statement of claim it was alleged as follows: "For the "purposes of discharging the said debt to the bank . . . . it "was the duty of the defendant to sell a sufficient part of the "testator's estate at the most favourable time within a year "from the testator's death. As no other asset was in fact "sold, a sufficient number of the said shares in Prices Trust Co. "should have been sold as aforesaid. Alternatively, a rateable "proportion of each investment other than the investments "requested by the said will to be retained should have been "sold as aforesaid. The defendant failed in its said duty "and in consequence of such failure the sales [of Prices' shares "after September 21, 1939] had to be effected at greatly "reduced prices."

Daynes K.C. and *Donald H. Cohen* for the plaintiffs. It was the duty of the company to sell sufficient assets to clear the debts during the first year. This not having been done, the onus is on the company to satisfy the court that it exercised a proper discretion and that good reason existed for the non-payment of the debts within the period. [*Grayburn* v. *Clarkson* (1); *Sculthorpe* v. *Tipper* (2); and Williams on Executors, 12th ed., p. 909, were referred to.]

Harman K.C. and *S. Pascoe Hayward* for the company. The plaintiffs' contentions fail, unless the court holds that the company did not exercise any discretion at all. It is admitted that the shares were not all sold within the year, but this conduct was, at its worst, an error of judgment and not a devastavit. The plaintiffs, indeed, do not make any charge of negligence. They merely allege breach of duty. There is no rule of law requiring executors to pay the testator's debts within a year of his death, and, in any case, the power contained in the will to retain investments justified the company in the course it took. The company has discharged the burden of showing that proper discretion has been exercised, and the damage alleged by the plaintiffs is too remote. [They referred to *In re Chapman* (3); *In re Norrington* (4); *Buxton* v. *Buxton* (5); *In re Crowther* (6).]

Daynes K.C. in reply.

Cur. adv. vult.

1941. Nov. 5. UTHWATT J. read a judgment in which, after stating the facts and saying that no suggestion was made that the company was in any way influenced in determining its course of action in the administration of the estate by Midland Bank, Ld., or by the fact that Midland Bank, Ld., was a creditor of the estate, continued: The plaintiffs' contention in law is that prima facie it was the duty of the defendants to sell sufficient assets to clear the estate of debts within a year from the testator's death, and that, as the estate was not so cleared, the onus rests on the defendants to satisfy the court that they exercised a proper discretion as to the retention of assets and non-payment of debts, and they asserted that on the facts no such proper discretion was exercised. The point was put somewhat higher in para. 14 of the statement of claim as alternatively amended. That paragraph also states the basis on which damages are claimed. [His Lordship read para. 14 of the statement of claim, and continued :] The defendants do not concede that there is owed to the beneficiaries any such duty to pay debts as is contended for by the plaintiffs, but, assuming there is such a duty, they contend that the power to retain assets was in this case duly exercised and that no complaint can, therefore, be made as respects their conduct. They further argue that damages of the nature claimed are too remote.

---

(1) (1868) L. R. 3 Ch. 605.
(2) (1871) L. R. 13 Eq. 232.
(3) [1896] 2 Ch. 763.
(4) (1879) 13 Ch. D. 654.
(5) (1835) 1 My. & Cr. 80.
(6) [1895] 2 Ch. 56.

The first question which I have to consider is the duty of an executor with regard to the payment of debts. Apart from any provisions contained in the will of a testator which expressly or impliedly deal with the payment of the debts, it is the duty of executors, as a matter of the due administration of the estate, to pay the debts of their testator with due diligence having regard to the assets in their hands which are properly applicable for that purpose, and in determining whether due diligence has been shown regard must be had to all the circumstances of the case. It was contended by the defendants that this was not a duty which was owed to beneficiaries. In my opinion, this contention is not correct. The duty is owed not only to creditors, but also to beneficiaries, for the ultimate object of the administration of an estate is to place the beneficiaries in possession of their interest and that object cannot be fully achieved unless all debts are satisfied. Where the debt is an interest-bearing debt the duty to pay so as to relieve the estate of the burden of interest is clear beyond dispute : see *Hall* v. *Hallet* (1), where the question arose in a suit for administration by beneficiaries brought in the Court of Chancery.

It was suggested in connection with an argument on the remoteness of damages claimed in this case that the duty applied only as respects interest-bearing debts, but I see no

(1) (1784) 1 Cox Ch. Cas. 134.

reason for so confining the duty. Where interest-bearing debts are not paid and assets are in hand properly applicable for the purpose, the loss to the estate occasioned by non-payment may, on a comparison of the rate of interest payable on the debt and the rate of interest earned by the estate, be obvious. Where the debt does not carry interest, or where, in the case of an interest-bearing debt, the interest earned by the assets which might properly be applied in paying the debt exceeds the interest payable on the debt, there may still be a loss to the estate in other directions, for example, in the costs occasioned by the executor defending proceedings brought by a creditor at common law to obtain payment of his debt. But it appears to me that the question whether damage has in fact resulted from non-payment of a particular debt is independent of the question whether there has been any maladministration involved in non-payment. It would be, in my opinion, incorrect to state the executor's duty to pay debts as arising out of a duty to prevent avoidable loss. His duty is to administer the estate and included in that duty is the obligation to all concerned to pay debts. Naturally, the question is not mooted unless loss in some form is suggested, and, no doubt, the general rule is that the loss stated to be due to a breach of the executor's duty should be alleged and proved at the trial. But if the court is satisfied that there has been a breach of duty, then it is open to the court in a proper case to make a declaration as to the breach of duty by the executor and to direct an inquiry as to damages: see *In re Stevens* (1), per Chitty L.J.

With respect to the period within which debts should be paid, there is, in my opinion, no rule of law that it is the duty of executors to pay such debts within a year from the testator's death. The duty is to pay with due diligence. Due diligence may, indeed, require that payment should be made before the expiration of the year, but the circumstances affecting the estate and the assets comprised in it may justify non-payment within the year, but, if debts are not paid within the year, the onus is thrown on the executors to justify the delay. No case was cited to me which states the rule in these direct terms, but it appears to me to be implicit in the statements as to the duties to convert assets incumbent on the executors which are made in *Grayburn* v. *Clarkson* (1).

---

(1) [1898] 1 Ch. 162, 172.

That, in my view, is the position apart from any provision contained in the will of the testator. As against creditors, the provisions of the testator's will which relate to the realization of his assets or otherwise bear on the payment of debts are irrelevant. As against beneficiaries, the position is different. Beneficiaries take their interest under the will only on the terms of the will. As respects them full effect has to be given to any provisions which, either in express terms or by implication, modify the executor's duty of paying debts with due diligence.

In the present case the provision relied on is the power to retain assets. On the construction of the will I am of opinion that the power of retention was exercisable, notwithstanding that debts of the testator were outstanding and that there was not sufficient cash in hand to meet the debts. The primary trust for conversion applies to the whole residue of the testator's estate other than money, and the proceeds resulting from the execution of that trust are treated by the testator as the fund out of which debts are to be paid. The power of retention is in terms applicable to all the assets comprised in the estate. Assets with regard to which the power is for the time being duly exercised are excluded from the assets which, under the testator's scheme, need, so far as beneficiaries are concerned, be applied in payment of debts. Beneficiaries cannot complain if the directions given by the testator are adhered to. [His Lordship examined the facts and said that, in his opinion, the power of retention had been duly exercised and the action failed.]

Solicitors: *Church, Adams, Tatham & Co., for Day & Yewdall, Leeds; Coward, Chance & Co.*

(1) L. R. 3 Ch. 605.

J. L. D.

In re ROYAL MUTUAL BENEFIT BUILDING SOCIETY'S APPLICATION.

UTHWATT J.

1941
Oct. 21.

Emergency legislation — Mortgage — Enforcement — Application for leave to exercise remedy—Objection by mortgagor that application made without authority of mortgagee—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.), (iv.).

Where, under s. 1, sub-s. 2 (*a*) (ii.), (iv.), of the Courts (Emergency Powers) Act, 1939, an application to enforce a mortgage is made without the authority of the mortgagee, the mortgagor can, notwithstanding that the Act is directed only to procedural matters, take the objection that that authority is lacking.

MOTION.

Saltdean Estate Company, Ld., as mortgagor of and owner of the equity of redemption in certain properties mortgaged to Royal Mutual Benefit Building Society, alleged that the society's directors had not been appointed in accordance with its rules and that, therefore, its solicitor had no authority to act for it on an originating summons which had been taken out in its name under s. 1, sub-s. 2 (*a*) (ii.), (iv.), of the Courts (Emergency Powers) Act, 1939 (1), asking for leave to exercise any remedy available to it by way of taking possession of the property, the appointment of a receiver, or the realization of its security. The mortgagor filed evidence of the invalidity of the appointment of the directors, and by this motion asked that the society's name, for the use of which it had not given and could not give its authority, be struck out of the originating summons, and that the society's solicitor be ordered to pay the costs.

G. A. Russo (for *E. J. Bagshawe*, on war service), for the mortgagor. It is open to the mortgagor to take the objection that the solicitor has no authority to act for the society. There is ample evidence that the society's directors were not appointed in accordance with its rules, and it follows that the society could not authorize the solicitor to take out the present summons. It is true that the Courts (Emergency Powers) Act, 1939, deals only with procedure, but that is no reason for allowing proceedings under it to be improperly instituted. In this case the proceedings have been improperly instituted, and the society ought not to be allowed to exercise its remedies as mortgagee.

---

(1) By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court,—(*a*) to "proceed to the exercise of any "remedy which is available to "him by way of .... (ii.) the "taking possession of any property "or the appointment of a receiver "of any property; .... (iv.) the "realisation of any security ...."

Newsom for the society. The society ought not to be ordered to file an affidavit in these proceedings. The mortgages themselves are sufficient evidence: see Practice Direction, November 15, 1939. Further, it has been held that, when proceedings of this kind have been launched, the mortgagor is not free to question whether there is a prima facie case for the exercise of the mortgagee's rights: *In re Huddersfield Building Society, Ld.'s Application* (1); *In re Fraser-Taylor's Application* (2). If there were no war, the society could proceed unhindered. The only object of the Courts (Emergency Powers) Act, 1939, is to prevent undue hardship being worked on a mortgagor. The Act cannot be used, as it is sought to use it here, to attack the internal machinery of the society and to make use of a defect thus discovered to prevent it exercising its rights.

UTHWATT J. The Courts (Emergency Powers) Act, 1939, is directed only to procedural matters. It bars the unrestricted exercise of rights to which a mortgagee is normally entitled. The application in the present case is to have that bar removed and it purports to be made by the mortgagee society. The mortgagor takes the objection, in substance, that it is not the mortgagee who has made the application. In my opinion, it is open to the mortgagor to take that objection. There is no more reason why he should be harassed by proceedings which are not properly authorized where those proceedings are merely of a procedural character, than there is why he

(1) [1940] W. N. 247.
(2) Ante p. 40.

should be harassed where the proceedings are of a substantive character. I, accordingly, hold that the mortgagor can challenge the existence of any authority in the solicitor to act for the mortgagee.

UTHWATT J.
1941
ROYAL MUTUAL BENEFIT BUILDING SOCIETY'S APPLICATION, *In re.*

Solicitors: *D. Woodward Davey*; *Francis Coningsby & Co.*

K. R. A. H.

In re BEST.

BELK *v.* BEST.

BENNETT J.
1941
Oct. 27.

Settlement — Annuity — "Such a sum as shall after all deductions" amount to 300*l. a year—Freedom from income tax.*

By a marriage settlement, dated September 25, 1935, the husband directed that the trustees should, after his death, hold a sum of 5000*l.* on trust until the death or remarriage of his wife to pay to her out of the income of the trust fund and by sale from time to time of such part of the investments comprising the trust fund as should be necessary until the trust fund should be exhausted such a sum as should "after all deductions" amount to 300*l.* per annum:—

Held, that it was the duty of the trustees, when paying the annuity, to make deductions from it in respect of income tax.

In re Shrewsbury Estate Acts [1924] 1 Ch. 315, and *In re Cowlishaw* [1939] Ch. 654, distinguished.

ADJOURNED SUMMONS.

By a marriage settlement dated September 25, 1935, and made between the husband, Frederick Best, of the first part, his wife of the second part, and two trustees of the third part, the husband covenanted with the trustees that, if the marriage should be solemnized and the wife should survive him, his personal representatives would within six months after his death pay to the trustees 5000*l.* free of duties, with interest thereon at the rate of 4 per cent. per annum from his death until payment, and by cl. 2 he directed the trustees to hold the said sum of 5000*l.* and the interest thereon and investments thereof on trust until the death or remarriage of the wife to

BENNETT J.
1941
BEST, *In re.*
BELK *v.* BEST.

pay to her out of the "income of the trust fund for the time "being and by sale from time to time of such part of the "investments comprising the trust fund as shall be necessary "until the trust fund shall be exhausted such a sum as shall "after all deductions amount to 300*l.* per annum by equal "half yearly payments the first of such half yearly payments "to be made at the expiration of six months from the death "of the husband." The testator died on August 12, 1940, and his wife survived him. The trustees of the settlement took out a summons for the determination of the questions whether the widow was entitled, until her death or remarriage or until the trust fund should have been exhausted, to be paid out of the income and, so far as such income should be insufficient, out of the capital of the trust fund (1.) such a gross annual sum as, after deduction of the income tax to which she was for the time being assessable when computed in relation to all reliefs and allowances to which she was for the time being entitled, would leave in her hands a clear annual sum of 300*l.*, or (2.) such a gross annual sum as would leave in her hands a clear annual sum of 300*l.* after deduction from such gross annual sum of income tax at the standard rate for the time being in force, or (3.) a gross annual sum of 300*l.* not clear of any deduction of income tax.

Rose for the trustees.

Lightman for the widow. The words here are wide enough to entitle the widow to an annuity of 300*l.* free of income tax. She is to receive, not 300*l.*, but a gross annual sum which may be considerably more than, though based on, 300*l.* There is nothing but income tax to which the word " deductions " can apply, but there is sufficient in the terms of the will, apart from the word " deductions," to show that the settlor must have intended the annuity to be free of tax. [He referred to *In re Cowlishaw* (1) ; *In re Wells' Will Trusts* (2) ; *In re Shrewsbury Estate Acts* (3) ; *Gleadow* v. *Leetham* (4) ; *In re Saillard* (5) and

---

(1) [1939] Ch. 654.
(2) [1940] Ch. 411.
(3) [1924] 1 Ch. 315.
(4) (1882) 22 Ch. D. 269.
(5) [1917] 2 Ch. 401.

In re Loveless (1).] On the question whether the annuitant is entitled to retain personal allowances and reliefs, there is no reference to the amount which may be left in her hands after allowances and reliefs have been taken into account. He referred to *In re Maclennan* (2).

Rose [interposing with the consent of counsel for the respondents]. In *In re Cowlishaw* (3) counsel for the applicant distinguished all previous cases in which the word " deduction " was held not to refer to income tax on the ground that in *In re Cowlishaw* (1) the word could have no possible operation unless it included income tax, while, in every previous case, the word would have freed the annuity from any duty imposed between the date of the testator's will and the date of his death and, therefore, it was not necessary, to make it operative, to read it as including " income tax."

R. W. Goff for the legal personal representatives of the husband. The words "after all deductions" are not sufficient to save the annuity from liability to income tax. [He referred to *Wall* v. *Wall* (4).] In the earlier cases the court, taking a narrow view of the meaning of the word " deductions," did not feel free to allow the inclusion in it of income tax, but in later cases it was held that income tax was included in "deductions" if there was a context to support that interpretation. [He referred to *Lethbridge* v. *Thurlow* (5); *Sadler* v. *Rickards* (6) and *In re Shrewsbury Estate Acts* (7).] Prima facie, the word " deductions " does not extend to income tax and the annuitant must find a context to show that the word has been used so as to include income tax. If it is contended in the present case that, unless the word "deductions" is so used, it is meaningless, the answer is that it might have referred to the costs of realization to make good the annuity out of capital. On a true construction of the will the widow is to be left with a clear annual sum of 300*l.* which is subject to income tax. [He referred to *In re Maclennan* (2).]

(1) [1918] 2 Ch. 1.
(2) [1939] Ch. 750, 758.
(3) [1939] Ch. 654.
(4) (1847) 15 Sim. 513.
(5) (1851) 15 Beav. 334.
(6) (1858) 4 K. & J. 302.
(7) [1924] 1 Ch. 315.

BENNETT J.

1941

BEST, *In re.* BELK *v.* BEST.

BENNETT J., after stating the facts and the questions raised by the summons, said: It is well established that in testamentary instruments a provision for the payment of a yearly sum free of all deductions or of a clear yearly sum of some fixed amount does not free the person in whose favour a gift in those terms is made from the liability to pay the income tax which is payable in respect of the yearly sum. The case which is now relied on as establishing that proposition is *In re Loveless* (1). The question is whether, in the present instrument, there is a context which enables the court to say that the language of cl. 2 leads to the conclusion that, when the parties to the instrument used the term "deductions," they intended that term to extend to and include income tax. Mr. Goff, I think, is right in his submission that, before the court can construe the word "deductions" as extending to income tax, some positive indication must be found that the word was used with the intention that it should extend to and include income tax, the view which has been held for some time past being that the income tax which the payer of an annuity withholds when he makes payment to the annuitant is not technically a "deduction."

There have been cases in which the context enabled the court to conclude that when the word "deductions" was used it was intended to extend to and include the income tax. *In re Shrewsbury Estate Acts* (2) was such a case, and there is a decision of my own in *In re Cowlishaw* (3), where I came to the conclusion that, on the construction of the will which fell to be considered in that case, there was a context which forced me to the conclusion that the testator had intended to include the income tax in a direction that an annuity was to be paid "free of all deductions," the context which led me to that conclusion being the direction which preceded the words "to be paid free of all deductions," namely, that the annuity in question was to be paid "free of all duties." Whether that decision was right or wrong it is not for me to say, but it was on that context that I reached the conclusion to which I came.

---

(1) [1918] 2 Ch. 1. (2) [1924] 1 Ch. 315. (3) [1939] Ch. 654.

BENNETT J.

1941

BEST, *In re.* BELK *v.* BEST.

The question here is whether there is any context which enables the conclusion to be reached that it was the intention of the parties to the present deed that income tax should be included in the word "deductions." The first suggestion is that the conclusion should be reached because in the instrument there has been used part of a phrase which is commonly used by conveyancers when they wish to escape from the provisions to be found in the All Schedules Rules to the Income Tax Act, 1918. The answer to that argument is that only part of the customary phrase has been used and not the whole of it, and unless the whole of it has been used it is impossible, I think, to conclude that there was, in the minds of the parties, the intention to free the annuity from the payment of income tax. The second argument is that the word is meaningless and idle unless it is held to include income tax. In my judgment, that is not necessarily so in the present case, because the annual payment is to be made not merely out of the income of the fund but also, if the income is insufficient, out of the capital of the fund until the capital shall be exhausted. That provision may involve—I think must involve, but it is sufficient to say it may involve—periodical realizations of capital and the incurring of expense in connection with those realizations which expense, apart from the use of the words "all deductions," might be thought to be an expense which would have to be borne by the annuitant. In other words, it might be said that the cost incurred from time to time in realizing capital to discharge the annuity is an expense which should be deducted from the sum to be paid here unless the word "deductions" was in the clause.

In my view, therefore, I am bound to reject that argument, and, it being possible to put some meaning on the word "deductions" without holding that it includes income tax, the authorities are such that I am bound to hold that on the true construction of this sentence the duty of the trustees, when they pay the annuity, is to deduct income tax from it.

Solicitors: *Bentleys, Stokes & Lowless, for Belk & Smith, Middlesbrough; Maples, Teesdale & Co.*

J. L. D.

MORTON
J.

1941
Nov. 4, 7.

In re SKINNER.

MILBOURNE *v.* SKINNER.

Will—Annuities—Freedom from income tax—Sufficiency of direction.

A will directed payment to a beneficiary out of the income of the testator's estate of "the yearly sum of 500*l*." and "for his life such "a sum . . . . as will bring his income to 1000*l*. per annum."

Held, that (1.) those annual sums were subject to deduction of income tax; (2.) a testamentary annuity payable out of the income of the estate is not payable free of income tax unless the will so directs, even if it is paid out of income from which income tax has been deducted at the source before it reaches the trustees: *In re Sharp* [1906] 1 Ch. 793; *In re Cain's Settlement* [1919] 2 Ch. 364, 370, per Warrington L.J.; (3.) neither the words "a clear annuity" nor the words "free of all "deductions" are a sufficient direction to pay annuity free of income tax: *In re Wells' Will Trusts* [1940] Ch. 411, 413, per Simonds J., but a testator who wishes to free an annuitant from paying income tax ought to use the words "free of income tax," and, if he does not wish the words "income tax" to include sur-tax, ought to add "but not "free of sur-tax": *In re Reckitt* [1932] 2 Ch. 144.

ADJOURNED SUMMONS.

By his will dated October 11, 1916, William Moore Skinner, the testator, authorized his trustees, by cl. 9, to pay to his son out of the income of his estate "the yearly sum of 500*l*.," and, by cl. 16, to pay to his son "for his life such a sum (not "exceeding 500*l*. per annum) as will bring his income to 1000*l*. "per annum . . . ." The testator died on October 19, 1916, and by this summons, dated March 6, 1941, the trustees of the will asked (inter alia) whether the annual sums were or were not subject to deduction of income tax.

Droop for the trustees.

G. D. Johnston, Bonner, Stranders, Myles and Jopling for the beneficiaries.

MORTON J., after holding that the annual sums were subject to deduction of income tax, said: As many testators, executors and trustees seem to be very uncertain as to what amounts to a sufficient direction for payment of an annuity free of income tax, I think it may be useful if I state the following rules, which are well settled by authority :—

1. The first rule is that, if a testator directs payment of an annuity out of the income of his estate, the annuity is not payable free of income tax unless there is a direction in the will to that effect. If there is no such direction, income tax is payable by the annuitant : see, for instance, *In re Sharp* (1).

2. It makes no difference to the application of that rule if, in fact, the annuity is paid out of income from which income tax has been deducted at the source before it reaches the trustees. As Warrington L.J. said in *In re Cain's Settlement* (2), "payment at the source is nothing more, under the "Income Tax Acts, than the machinery by which the revenue "collects the tax from the person ultimately liable to pay. "In the case of a company it pays income tax on its own "gains and profits, and under the provisions of the Income Tax "Acts it collects from the individual shareholders the amount "of the income tax on their shares. It is nothing more than "that. But the income tax is the tax on the income of the "person who is the ultimate recipient of the gains and profits, "and not upon the person who, although liable to the tax, "has to pass on those gains and profits to somebody else."

3. It is not a sufficient direction to use the words "a clear "annuity" : *In re Loveless* (3).

4. It is not a sufficient direction to give an annuity "free of "all deductions." It is, I am afraid, the fact that many trustees have regarded those words as a sufficient direction, but see *In re Wells' Will Trusts* (4), where the words were ". . . . . free of all deductions by equal quarterly payments," and Simonds J. said : "From a long line of authority stretching "from *Lethbridge* v. *Thurlow* (5) and including *Sadler* v. "*Rickards* (6), *Gleadow* v. *Leetham* (7), and the more recent "cases in the Court of Appeal, *In re Saillard* (8), and *In re* "*Loveless* (9), I should have had no doubt whatever that on the

---

(1) [1906] 1 Ch. 793.
(2) [1919] 2 Ch. 364, 370.
(3) [1918] 2 Ch. 1.
(4) [1940] Ch. 411.
(5) (1851) 15 Beav. 334.
(6) (1858) 4 K. & J. 302.
(7) (1882) 22 Ch. D. 269.
(8) [1917] 2 Ch. 401.
(9) [1918] 2 Ch. 1.

MORTON J.
1941
SKINNER, *In re.*
MILBOURNE *v.* SKINNER.

"terms of this will the annuity is not given free of income "tax. There is no case among all those which have been cited "to me where an annuity had been stated to be free of income "tax unless there was clearly expressed on the face of the will "an intention of the testator that, when he referred to freedom "from deductions, he was including income tax." In view of the line of authorities referred to in that case, it is to be hoped that, in future, if a testator desires to free an annuitant from the payment of income tax, he will use the words "free "of income tax," and, if he does not desire the words "income "tax" to include sur-tax, will add the words "but not free "of sur-tax": see *In re Reckitt* (1).

Solicitors: *Maude & Tunnicliffe, for Simey, Iliff & Laing, Sunderland; Hammond & Richards; Pilley & Mitchell, for James Storey & Sons, Sunderland; Peacock & Goddard; Rowe & Maw.*

(1) [1932] 2 Ch. 144.

K. R. A. H.

UTHWATT J.
1941
Nov. 12.

In re BICKERTON'S SETTLEMENT.

SHAW *v.* BICKERTON.

Settlement—Gifts to children—Interest of daughter in income and trust fund—Death of daughter without issue—Implication of gift over.

By a settlement of personalty the settlor directed the trustees to apply the income of the trust fund after his death in the payment of certain annuities to his widow and four children. After the death of his widow they were to divide the trust fund into as many equal shares as there were children surviving him or who had died in his lifetime leaving issue surviving him, and to appropriate one share to each child, paying the income to that child. After the death of each child they were to hold the share in trust for that child's children who being male should attain the age of twenty-one years or being female should attain that age or marry under that age, in equal shares. The settlor further directed that, if there should be no grandchild who should attain that age or marry, the trustees should hold the fund in trust for himself (the settlor) absolutely. The settlor died in 1929, and one of his daughters died a spinster in 1941 in the lifetime of the settlor's widow:—

Held, (1.) that the share of income payable to her was payable to her legal personal representative during the remainder of the life of the widow of the settlor; (2.) that in the case of a settlement of personalty it was possible in law to imply a gift over as regarded the share of one beneficiary in favour of the shares of the others. Dictum in *Adamson* v. *Attorney-General* [1933] A. C. 257, 279, followed; (3.) that, on the true construction of the settlement, the share appropriated to the deceased daughter should be held after her death upon the trusts concerning the shares directed to be appropriated to the other children.

ADJOURNED SUMMONS.

On October 17, 1908, the settlor, Henry Nield Bickerton, made a settlement of certain personal property, transferring it to trustees. He had then four children: Elizabeth Nield Bickerton (hereinafter called " the deceased daughter "), Henry Cooper Bickerton (" the son "), Alice Mary Bickerton and Agnes Bickerton. The settlement directed an annuity of 1000*l.* to be paid to the settlor during his life, out of the income of the settled fund, the surplus being accumulated. By cl. 3 it was provided: " After the death of the settlor the "trustees shall apply the said income in the payment thereout "annually to Alice Cooper Bickerton, the wife of the settlor, "of the sum of 500*l.* and a further sum of 100*l.* annually to "the said Alice Cooper Bickerton in respect of each child of "the settlor now born who shall be living with her the said "Alice Cooper Bickerton and who shall be under the age of "twenty-one years to be applied by her for the benefit of "such child and as to the said surplus (if any) of the said "income in trust to pay the same to the children of the settlor "now born in equal shares as and when they shall respectively "attain the age of twenty-one years . . . ." By cl. 4: " After "the death of the said Alice Cooper Bickerton the trustees "shall hold the said trust fund upon trust to divide the same "into as many equal shares as there shall be children of the "settlor now born surviving him or who shall have died in "his lifetime leaving issue surviving him and shall appropriate "one of such shares to each such child who shall survive him "or who shall have died leaving issue as aforesaid (and so that "any reference hereinafter contained to the shares of such "respective children in the said trust fund shall be deemed "to apply to the shares hereinafter directed to be appropriated "to them respectively whether they shall respectively survive "him or not) but so nevertheless that such respective shares "shall be held by the trustees upon the trusts and subject to "the powers and provisions hereinafter declared and contained "concerning the same respectively that is to say the trustees "shall hold the share appropriated to each such child from "and after such division and appropriation as aforesaid upon "trust to pay the income arising therefrom to such child and "after his or her decease in trust for all the children of such "child who being sons shall attain the age of twenty-one years "or being daughters shall attain that age or marry under that "age in equal shares and if there shall be only one such child "the whole to be in trust for that one child." By cl. 9: "If "there shall be no such grandchild as aforesaid of the settlor "who being male shall attain the age of twenty-one years or "being female shall attain that age or marry under that age "then the said trustees shall hold the said trust fund in trust "for the settlor absolutely."

The settlor died on October 6, 1929, and the deceased daughter on January 23, 1941, without having been married, and her will was proved by the son. The widow and the other two daughters were also living. The son was married, but had no children. The surviving daughters were married and had infant children. On August 1, 1941, the trustees took out a summons to determine whether on the true construction of the will (1.) the share of income, which under cl. 3 was payable to the deceased daughter, was payable during the remainder of the life of the widow to the son as personal representative of the deceased daughter, and (2.) the share of the trust fund directed by cl. 4 to be appropriated to the deceased daughter was held since her death (*a*) upon trust for the settlor's estate or (*b*) upon the trusts declared concerning the shares directed to be appropriated to the other children of the settlor in equal shares and proportions.

Humphrey King (for *Wigglesworth*, on war service) for the trustees.

Tillard for the widow. The settlor intended that the deceased daughter's interest in the share of income given by cl. 3 should continue only during her lifetime. The words used are consistent only with a living recipient of the share of income being contemplated. Accordingly, this income is not payable to the deceased daughter's legal personal representative until the death of the widow, but it falls into the settlor's estate. With regard to the share of the trust fund directed by cl. 4 to be appropriated to her, a gift over in favour of the shares of the other three children should not be implied, but that, too, should fall into the estate of the settlor. The court is reluctant to imply cross-limitations: *In re Mears. Parker* v. *Mears* (1).

C. Gandy for the son. On its true construction cl. 4 gave the deceased daughter the income of her share in perpetuity. The trusts set out at the end of the clause amount to an indefinite gift of income vesting the capital of each share in a child of the settlor unless the subsequent trusts are fulfilled and the gift passes to the children of that child. On this view there is no need to go to the extreme of implying cross-remainders. [He referred to *Hancock* v. *Watson* (2) and *Lassence* v. *Tierney* (3).]

Romer K.C. and *J. A. Wolfe* for the surviving daughters and their children. On the true construction of the settlement a gift over in favour of the shares of the three surviving children must be implied. This is exactly the sort of case where the court will imply cross-remainders over: Hawkins on Wills, 3rd ed., pp. 247-8; *In re Ridge's Trusts* (4); *In re Clark's Trusts* (5); *Adamson* v. *Attorney-General* (6). [They also referred to *Edwards* v. *Alliston* (7) and *Doe d. Clift* v. *Birkhead* (8).] In the case of realty, estates of inheritance can only be created by certain well-defined terms, and there is no room for implication if the words are not there, but in the case of personalty this does not apply and a gift over can be implied.

(1) [1914] 1 Ch. 694, 697.
(2) [1902] A. C. 14.
(3) (1849) 1 Mac. & G. 551.
(4) (1872) L. R. 7 Ch. 665.
(5) (1863) 32 L. J. (Ch.) 525.
(6) [1933] A. C. 257, 279.
(7) (1827) 4 Russ. 28.
(8) (1849) 4 Ex. 110, 124.

UTHWATT J.
1941
BICKERTON'S SETTLEMENT, *In re.*
SHAW *v.* BICKERTON.

UTHWATT J. [having stated the facts:] Upon the first question I feel no difficulty. It appears to be quite clear that, having regard to the form of gift in cl. 3, what the deceased daughter got on attaining the age of twenty-one years was a right to receive her proportionate share of income during the lifetime of her mother. There is nothing in the settlement to take that right away or cut it down and I am unable to accede to the argument put forward by Mr. Tillard that what was intended was that the deceased daughter's interest in this share of income endured only during her lifetime. The gift is in such a form that it will not bear the construction that it was to be limited to this period.

The second question relates to the destination of the one-fourth share of which the deceased daughter was tenant for life. Under cl. 4 the capital of the trust fund is to be divided into as many shares as there are children of the settlor surviving him or as shall have predeceased him leaving issue surviving him. One share is to be appropriated to each such child, and then there is a general direction that the share appropriated to a child is to be held on trust to pay the income to that child and after the death of the child on trust for his or her children. Having regard to the ultimate gift in cl. 9, no one suggests that the rule in *Lassence* v. *Tierney* (1) applies so as to give the deceased daughter, in the events that happened, an absolute interest in the corpus of her share and I am unable to accede to the argument put forward on behalf of her personal representative that, in the events that happened, cl. 4 on its true construction gave her the income in perpetuity. The substantial point which I have to decide is whether Mr. Romer is right in his contention that, on the true construction of the settlement, one must imply a gift over in favour of the shares of the other three children as regards the share of the deceased daughter. That it is possible in law to imply such a gift over in a settlement of personalty is, in my opinion, clear. Sufficient authority for that view is to be found in the speech of Lord Russell in *Adamson* v. *Attorney-General* (2). The question whether the gift

(1) 1 Mac. & G. 551.

(2) [1933] A. C. 257, 279.

over ought to be implied in this case depends on the true construction of the settlement. The argument in favour of such implication is based on cl. 9 of the settlement which runs as follows: " If there shall be no such grandchild as aforesaid "of the settlor who being a male shall attain the age of "twenty-one years or being a female shall attain that age or "marry under that age then the said trustees shall hold the "said trust fund in trust for the settlor absolutely." Read alone, the clause merely states one event in which the trust fund is to revert to the settlor. Read in connection with the rest of the settlement, the clause states the only event in which within the contemplation of the settlement the settlor is to take any interest in any part of the trust fund. On going back to cl. 4 one finds that the trust fund is dealt with under a general formula dividing it between the children and settling the children's shares in terms which, if cl. 9 were not included in the settlement, would dispose of the whole fund in all events. In the course of the argument my mind has wavered on the question whether the gift over which is contended for ought to be implied, but on the whole I am of opinion that by implying that gift over I am not doing more than giving effect to the intention of the settlor as expressed in the settlement. Authority for making this implication is I think to be found in *In re Clark's Trusts* (1). The matter is one of trying to arrive at what are the real dispositions made by the settlement on the assumption that the only event in which the settlor is to take the trust fund or any part of it is the failure of any of his grandchildren to attain the age of twenty-one years or, being female, to marry.

Solicitors: *Durrant Cooper & Hambling, for Wigglesworth & Son, Manchester; Gregory, Rowcliffe & Co., for Pattinson & Harrison, Macclesfield; Corbin, Greener & Cook, for Bennett, Brooke, Taylor & Co., Buxton.*

F. C.

(1) 32 L. J. (Ch.) 525.

MORTON J.

1941 Nov. 10, 11.

In re CAIDAN.

Ex parte OFFICIAL RECEIVER *v.* REGIS PROPERTY COMPANY, LIMITED.

Bankruptcy—Priority debts—Distress by landlord within three months before receiving order—Rent due from debtor's husband—Goods of debtor taken and sold—Assets insufficient to satisfy priority debts—Right of trustee to charge over proceeds of sale in favour of priority creditors—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 4.

By a lease granted by the respondents in 1935, shop premises were let for fourteen years to D. C., whose wife, E. R. C., carried on business thereon. On February 10, 1939, arrears of rent amounting to 418*l.* were due to the respondents, and they, by a certificated bailiff, levied a distress and seized goods belonging to E. R. C. The goods were sold by the bailiff, and ultimately realized 50*l.* On February 21, a receiving order in bankruptcy was made against E. R. C. on her own petition and she was adjudicated bankrupt. The assets were insufficient to pay the priority creditors, and the Official Receiver, as trustee, claimed under s. 33, sub-s. 4, of the Bankruptcy Act, 1914 (1), a charge on the proceeds of sale of the goods distrained on, for the payment of priority debts :—

Held, that as from the date of the receiving order the Official Receiver, as trustee in bankruptcy, became entitled to enforce the charge created by s. 33, sub-s. 4, of the Bankruptcy Act,

---

(1) Bankruptcy Act, 1914, s. 33, sub-s. 1 : " In the distribution of "the property of a bankrupt there "shall be paid in priority to all "other debts :" then follows a list of certain specified debts.

Sub-sect. 2 : " The foregoing "debts shall rank equally be- "tween themselves and shall be "paid in full, unless the property "of the bankrupt is insufficient to "meet them, in which case they "shall abate in equal proportions "between themselves."

Sub-sect. 3 : " Subject to the "retention of such sums as may be "necessary for the costs of admini- "stration or otherwise, the fore- "going debts shall be discharged "forthwith so far as the property "of the debtor is sufficient to meet "them."

Sub-sect. 4 : " In the event of a "landlord or other person dis- "training or having distrained on "any goods or effects of a bank- "rupt within three months next "before the date of the receiving "order the debts to which priority "is given by this section shall be "a first charge on the goods or "effects so distrained on, or the "proceeds of the sale thereof : "Provided that in respect of any "money paid under any such "charge the landlord or other "person shall have the same "rights of priority as the person "to whom such payment is made."

1914, in favour of the priority creditors and the respondents, though not the landlord of the debtor, were accountable to him for the proceeds of the distress as being "a person" other than a landlord "distraining or having distrained on the goods of the "bankrupt" within the meaning of that sub-section.

MOTION.

By a lease made in September, 1935, the respondents, Regis Property Co., Ld., demised premises, 86 Brompton Road, S.W., to David Caidan for a minimum term of fourteen years, and he continued in occupation of the premises which were used by his wife, Esther Rosa Caidan, for the conduct of a dressmaking business. On December 25, 1938, 418*l.* 18*s.* was due to the respondents from D. Caidan for rent, and on February 10, 1939, on instructions given to him by Plus Flats Management, Ld., who were agents of the respondents, W. H. Armitage, a certificated bailiff, levied a distress for those arrears of rent on the premises and seized dresses, coats and costumes, the property of Esther Rosa Caidan. On February 21, a receiving order in bankruptcy was made against Esther Rosa Caidan on her own petition and on the same day she was adjudicated bankrupt. At this date the goods seized under the distress still remained in the possession of the bailiff. On March 7 it was ordered that the estate of the bankrupt be administered in a summary manner, pursuant to s. 129 of the Bankruptcy Act, 1914, and the Official Receiver became the trustee of her property. At some date after the receiving order was made the goods seized were sold by Armitage for a net sum of 50*l.* 10*s.*, and these proceeds of sale were credited by Armitage to the respondents. The assets of the bankrupt, including the proceeds of sale, were insufficient to meet the claims of creditors whose debts were entitled to priority under s. 33 of the Bankruptcy Act, 1914. The Official Receiver now moved for a declaration that he was entitled, under s. 33, sub-s. 4, to a charge on the proceeds of the sale of the goods distrained on in the hands of the respondents, and for an order that they should pay him the 50*l.* 10*s.*

Raeburn for the Official Receiver. Sect. 33, sub-s. 4, of the Bankruptcy Act, 1914, has a plain meaning. If a landlord distrains for rent he takes the risk of having to make a payment out of the proceeds of sale to any creditors who are entitled to priority in the distribution of the bankrupt's estate. It would make nonsense of the sub-section if the landlord, having made a distress, could immediately dispose of the proceeds, and it would leave the way open to collusive distress. The Official Receiver is entitled to the declaration for which he asks, for the priority debts are a first charge on the proceeds of the sale of the goods taken in distress. There appears to be no authority on the construction of this sub-section.

Astell Burt for the respondents. Several questions arise in this case. They are: (1.) Who is the person who can enforce the charge? (2.) Against whom can the charge be enforced? (3.) When does the charge become effective? (4.) What is the effect of the charge? (5.) Does the charge arise when the bankrupt is not the tenant of the premises where the distress was levied? On the first point, the charge is not vested in favour of the trustee in bankruptcy, but of the priority creditors. The sub-section does not indicate exactly how the charge is to be enforced, but payment is to be made to the person who claims priority. "Person" must be read as "person or persons" in accordance with the Interpretation Act, 1889, that is, the priority creditors, and the proviso clearly means that the landlord who has distrained is to have the same rights of priority as any other creditor entitled to priority under the section. The charge can only be enforced against the landlord or "other person" who has levied a distress. A company can only levy a distress through a certificated bailiff, and, in the case of a company, the words "other "person" in the sub-section must refer to a bailiff. The charge arises when it first appears that the assets are insufficient to pay priority debts, or when the person holding the proceeds of sale is notified by a preferential creditor that he intends to make a claim. It cannot arise until after the receiving order is made, but it does not necessarily arise then. It cannot become effective until the bailiff has been notified. In this case the charge never became effective. The sub-section appears to create a hardship on the landlord and almost requires a bailiff to possess prophetic powers, and foresee the bankruptcy, not of the tenant, but of the owner of the goods distrained. The sub-section must be read in the light of s. 35 and is confined to a distraint on the goods of the tenant of the premises. " The "landlord " must refer to the landlord of the debtor, and not the landlord of a tenant on whose premises the goods distrained upon happen to be.

Raeburn in reply. At common law a bailiff is the agent of the party entitled to distrain. Therefore, the words " or "other person " cannot refer to a bailiff. They mean any person, not being the debtor's landlord, who is entitled to distrain. There are many persons, such as bailees, with goods deposited on premises, who are liable to have their goods distrained on by a person who is not their landlord. The sub-section does not create any new class of secured creditors or make any person a creditor who was not already a creditor. Its effect is that the proceeds of a distress must be made available to all priority creditors, if any. The generality of the words " the landlord or other person distraining " cannot be cut down in any way because the effect may be to create a hardship. Where the assets are very small, as here, it may make a great difference to preferential creditors if the sub-section is not interpreted as it is submitted it should be.

MORTON J. [having stated the facts, and read s. 33 of the Bankruptcy Act, 1914.] I think that the opening words of the section are of some importance with regard to the questions which I have to consider. The person who is to pay these debts in priority to all other debts is clearly the trustee in bankruptcy, and he is to do it in the distribution of the property of the bankrupt. The questions which arise on s. 33, sub-s. 4, of this Act were conveniently stated by Mr. Astell Burt as follows : First, who is the person who can enforce the charge created by this sub-section ? Secondly, against whom can the charge be enforced ? Thirdly, when does the charge arise ? Fourthly, what is the effect of the charge ? Fifthly, does the charge arise when the bankrupt is not the tenant of the premises where the distress was levied, or is it limited to the case of a landlord distraining on the goods of his tenant?

I prefer to put the first question "Who is the person "who can enforce the charge?" in these words: "Can the "trustee in bankruptcy enforce the charge?" because that is what I have to determine. Mr. Burt, in dealing with this part of the case, relied very strongly on the proviso to sub-s. 4. He submitted that the first part of the sub-section left open the question who was entitled to enforce the charge, but that the wording of the proviso made it plain that the only persons who could enforce the charge were the priority creditors. He pointed out that the words of the proviso are "in respect "of any money paid under any such charge the landlord "or other person shall have the same rights of priority as the "person to whom such payment is made," and he suggested that the words "the person" are inappropriate as applied to the trustee in bankruptcy because the trustee in bankruptcy as such has no rights of priority. The proviso contemplates, he says, that a sum shall be paid by the "landlord or other "person" to someone who has rights of priority. I feel the force of that argument and I do not think that the language of the sub-section is very happy, but, in my view, the answer to Mr. Burt's argument is that the legislature contemplates that the person paying the money under the charge is paying it through the trustee in bankruptcy to the priority creditors. I think that the words of the proviso are quite open to the construction that the payment may be made to the trustee in bankruptcy and this construction has the advantage of making the sub-section fit into the general scheme of the Act and of s. 33. In my view, the trustee in bankruptcy can enforce this charge. He is the person through whom the priority creditors are paid under sub-s. 1, and I think it is important to note that all the debts to which priority is given by the section are charged on the goods or effects or the proceeds of the sale thereof by sub-s. 4. The priority debts as a whole are to be a first charge on the goods and effects or the proceeds of sale, and it seems to me natural that the trustee in bankruptcy should be the person to enforce the charge with a view to paying those debts. A curious and inconvenient position would arise if the priority creditors, and they alone, had power to enforce the charge. Mr. Raeburn pointed out some of the difficulties which would arise. He asked: How could any one priority creditor enforce the charge? All the priority debts rank pari passu under sub-s. 2 and he suggests that any individual creditor seeking to enforce the charge would be met with the objection: You are only entitled to a rateable amount. He submits that it would be contrary to the whole plan of the bankruptcy legislation if, for example, in the present case there were six priority creditors for 50*l.* each and the first of them could come and claim the whole fund. He submits further that it would be highly inconvenient for the court to attempt to decide what rights any individual priority creditor had against the chattels or the proceeds of sale in the absence of the trustee in bankruptcy or all the priority creditors. At the time when the application was made to the court to enforce a charge it might not have been determined who the priority creditors were, and it might be necessary for the creditor applying to satisfy the court by evidence of the total amount of the priority debts. I do not think it is necessary, and I do not think it would be right, to decide on this application whether or not the individual priority creditors are wholly excluded from seeking to enforce the charge, but, in my view, whatever rights of enforcing the charge may or may not be vested in the individual creditors, the trustee in bankruptcy is entitled to enforce it, for the reasons which I have indicated. I should add that I might have felt more difficulty in arriving at this conclusion if the priority creditors had been sub-divided into different classes, each class having a different priority. In that event difficulties might have arisen under the words "shall have the same rights "of priority as the person to whom such payment is made," but, as the priority creditors all rank equally between themselves, no such difficulties arise and I see no difficulty in regarding the payment referred to in the proviso as being a payment to the priority creditors through the trustee in bankruptcy.

MORTON J.

1941

CAIDAN, *In re.* OFFICIAL RECEIVER *v.* REGIS PROPERTY CO., *Ex parte.*

The second question is: Against whom can the charge be enforced? Mr. Burt suggests that in the present case the only person against whom the charge can be enforced is the bailiff, and that the wrong party has been made a respondent to this motion. He points out that in the present case, and in all other cases when the landlord is a company, the distress is carried out by a bailiff and the proceeds of sale reach the hands of the bailiff in the first instance. He suggests that the words: "In the event of a landlord or other person "distraining or having distrained" are apt to include a bailiff. I do not take that view. In my view, the bailiff distrains merely in the capacity of an agent for the person levying the distress. This is so stated in Halsbury's Laws of England, Hailsham ed., vol. x., p. 493, and I see no reason to doubt that the statement is correct. Further, from a practical point of view, I cannot conceive that the intention of the legislature by this sub-section was to treat the bailiff as being the person who has distrained in every case in which a bailiff was employed for the purpose. If that were the intention of the section, the result in the present case would, I suppose, be—as Mr. Burt submitted—that the bailiff, having got goods in his hands which were subject to a charge by reason of the receiving order, would be personally liable for having sold the goods, received the proceeds, and paid them to the respondents. I cannot think that that was the intention. In my view, the "landlord or other person" referred to in the sub-section is the principal on whose instructions the distress is levied and not the agent through whom the distress is actually carried out.

The third question—When does the charge arise?—seems to admit of only one answer. I think that the charge arises on the making of the receiving order. The position is a very curious one, because, if that be the interpretation of the section, as I think it is, any landlord or other person distraining will not know whether or not the person whose goods are taken under the distress will have a receiving order made against him or her within the next three months, and, if a receiving order is made, the charge comes into existence. It may be that this involves some hardship, but what I have stated seems to me to be the effect of the sub-section.

As regards the effect of the charge, which is the fourth question, I think the meaning of the words "shall be a first "charge on the goods or effects so distrained on, or the proceeds "of the sale thereof" is not very easy to define in all the cases which might possibly arise, but I am only concerned to define what is the effect in the circumstances of the present case. In my view, the charge was a charge on the goods and effects in the hands of the bailiff. The respondents are liable to pay to the trustee in bankruptcy a sum equivalent to the amount of the proceeds of sale, because the respondents have in effect received the proceeds of sale instead of those proceeds being received by the person in whose favour the charge arose.

As regards the fifth question, Mr. Burt submitted that the charge only arose in a case in which a landlord distrained on the goods of his tenant. I cannot take that view. I think it is impossible to accede to this argument having regard to the use of the words "a landlord or other person." To my mind, it is plain that the respondents in this case are either a landlord or an "other person," within the meaning of the section. It is true that the respondents are not the debtor's landlord, but they were at the time of the distress a landlord distraining on goods which were on the property demised to that landlord's tenant. It is not necessary, however, to decide whether or not they are a landlord within the meaning of the section, because, in my view, it is abundantly clear that they come within the words "a landlord or other person." In that connection it is to be noted that s. 35 begins with the words "The landlord or other person to whom any rent is due from the "bankrupt." The insertion of these words, "to whom any "rent is due from the bankrupt," in s. 35 and their omission from s. 34, seems to me to make it still more plain that a person in the position of the respondents comes within the wording of s. 33, sub-s. 4.

The result is that, in my view, the respondents having distrained on goods or effects of the bankrupt within three months next before the date of the receiving order, the debts to which

MORTON J.
1941
CAIDAN, *In re.*
OFFICIAL RECEIVER *v.* REGIS PROPERTY CO., *Ex parte.*

priority is given by s. 33, sub-s. 1, were a charge on such goods and effects; the trustee is a proper person to enforce the charge; the respondents are the proper persons against whom the charge should be enforced; and, in the circumstances of the present case, the respondents are liable to pay to the trustee in bankruptcy the sum of 50*l.*

[His Lordship made a declaration that the Official Receiver was entitled to be paid by the respondents the sum of 50*l.*, being the sum agreed to be the equivalent of the net proceeds of the sale of the goods and effects of the bankrupt distrained by the respondents within three months next before the date of the receiving order; and an order that the respondents do pay to the Official Receiver the sum of 50*l.*; the respondents to pay the Official Receiver's costs.]

Solicitors: *Tarry, Sherlock & King*; *Wedlake, Letts & Birds.*

H. L. L.

MORTON J.
1941
Nov. 17, 18.

JOHNSTONE *v.* SWAN ESTATES, LIMITED.

Emergency legislation—Landlord and tenant—War damage—Flat—Damage to other parts of building—Loss of services—Unfitness for occupation—Notice of disclaimer—Notice to terminate lease under provision therein—Approbation and reprobation—Estoppel—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 *Geo.* 6, *c.* 72), *s.* 1, *sub-ss.* 1, 4.

A block of flats suffered damage by enemy action with the result that the services of electric light, gas, lifts and heating were cut off. The tenant of one of the flats, which was not itself physically damaged, served on the landlord a notice of disclaimer under s. 4, sub-s. 2 (*a*), of the Landlord and Tenant (War Damage) Act, 1939, on the ground that the flat was unfit for occupation owing to the failure of the services. The landlord refused to accept the notice and the tenant then gave notice to terminate his tenancy under a clause in the lease which empowered him to do so "if "the flat or other parts of the mansion shall be destroyed or "damaged by any means not arising by the act or default of the "lessee or any person being a servant of the lessee or being in the "flat with his express or implied permission so as to render the "flat unfit for occupation." The landlord refused to accept that notice and served on the tenant a notice to avoid disclaimer under s. 4, sub-s. 5, of the Act. The tenant took out a summons to determine whether he was entitled to exercise the option to terminate the lease contained in the clause:—

Held, that the flat had been rendered unfit for occupation within the meaning of the clause; that the right of the tenant to terminate the lease under the clause was not a right arising out of the non-fulfilment of an obligation to repair within the meaning of s. 1, sub-s. 4, of the Act; and that, although the tenant had previously served a statutory notice of disclaimer on the landlord, he was not prevented, either by the doctrine of approbation and reprobation or by that of estoppel, from terminating his tenancy under the lease.

Cooper v. *Jax Stores, Ld.* [1941] 1 K. B. 577, distinguished.

ADJOURNED SUMMONS.

By a lease dated July 22, 1938, the lessee, Gerald Ewart Johnstone, took from the lessors, Swan Estates, Ld., a flat at Swan Court, Manor Street, Chelsea, S.W., at a rent of 200*l.* a year, for a term of seven years from September 9, 1938.

The lease after reciting that " the lessors being estate owners "of the building (hereinafter called ' the mansion ') known as "' Swan Court ' Manor Street in the borough of Chelsea in the "county of London are desirous of letting parts thereof in "flats for private residences and intend that the flats so let "shall be subject to regulations to be made from time to time "by the lessors for the management of the mansion and the "conveniences to be afforded to the tenants and otherwise "and pursuant to that intention the lessors have already made "the regulations a copy whereof is contained in the first "schedule hereto" provided by cl. 1: " In consideration "of the rents and covenants on the part of the lessee herein-"after reserved and contained the lessors hereby demise to "the lessee all those several rooms bathrooms and servants' "offices known as Flat No. 144 on the eighth floor of the "mansion . . . . together with the use in common with the "lessors and their other lessees of the entrance halls staircases "lifts and passages leading to the flat and also of the gas and "water pipes and electric wires in the mansion for services of "the flat . . . ." Clause 2 contained (inter alia) the following covenants by the lessee with the lessors: (1.) that the lessee would pay the rent; (2.) " that the lessee will pay all charges

MORTON
J.
1941
Johnstone
v.
Swan
Estates,
Ld.

"in respect of gas and electricity used in the flat and in respect "of the maintenance and repair of the electrolux refrigerator "which is a landlord's fixture." (3.) "That the lessee will "from time to time and at all times during the term hereby "granted well and substantially repair cleanse maintain amend "and keep the inside of the flat and the landlord's fixtures "therein (unless the same shall be destroyed or damaged by "fire) and in particular will as occasion requires clean all "windows all cisterns boilers and water pipes and keep all "ball cocks water pipes gas pipes and electric wires and tubes "in the flat in good order and condition and will immediately "replace all broken windows." The lessors covenanted "(4.) "that the lessors will provide and maintain a proper supply of "hot and cold water to the flat the hot water being heated "between the hours of seven A.M. and eleven P.M. but the "lessors shall not be liable to the lessee for any failure in the "supply of water howsoever caused but in the event of any "such failure the lessors will with all reasonable despatch do "such repairs as may be requisite for the restoration provision "and maintenance of such supply." (5.) "The lessors will "supply and maintain from the first day of October in each "year to the first day of April in each year between the hours "of seven A.M. and eleven P.M. in each day of the said period "a supply of hot water or steam to the radiators of the flat in "order to heat the flat." [Then followed the same provision, as to the lessors not being liable for any failure in the supply as that contained in sub-cl. (4.).] (6.) "The lessors will keep "servants who shall at the expense of the lessors perform the "services specified in the second schedule hereto." The second schedule dealt with such matters as the cleansing of the entrance hall and lifts, removing the dust bins, attending to the lighting of the entrance hall, staircases and lifts, and attending to the lifts and luggage. By cl. 6: "If the flat or "other parts of the mansion shall be destroyed or damaged "by any means not arising by the act or default of the lessee "or any person being a servant of the lessee or being in the "flat with his express or implied permission so as to render "the flat unfit for occupation this present lease may be "terminated at the option of either the lessors or the lessee "(notice of such option to be served on the other of them in "writing within three months from such destruction or "damage) and thereupon this lease and everything herein "contained shall be void as from the date of such destruction "or damage without prejudice to any claim by either party "against the other in respect of any antecedent breach of "covenant and the right of the lessors to the respective rents "hereby reserved up to such date."

On September 9, 1940, parts of the mansion were destroyed or damaged by enemy action. The lessee's flat was not itself physically damaged, but all the services to the flat, i.e., lifts, hot water, electric light and gas, were cut off. On September 10, the agents of the lessee wrote to the agents of the lessors stating that the flat was unfit for occupation, and giving, on behalf of the lessee, notice to disclaim the lease, under s. 4, sub-s. 2 (*a*), of the Landlord and Tenant (War Damage) Act, 1939. The lessors' agents replied that, in view of the fact that the flat had been passed by the authorities as fit for habitation, the lessors could not accept the notice of disclaimer. On September 27 the lessee wrote personally to the lessors: " . . . . I am now writing to determine the lease of No. 144 "Swan Court under cl. 6 of the lease. I cannot apprehend that, "having regard to the admitted condition of the north block "my right to take this step can be questioned, but as a formality, "and in order to obviate the necessity of doing so in the "future, should any dispute arise, I should also like formally "to give notice of my intention to determine the present "lease at the expiration of the third year of the term . . . ." i.e., September 29, 1941. On September 30, 1940, the lessors' agents wrote to the lessee stating that while accepting his formal notice to determine the lease at the end of the third year of the term, they could not accept his notice under cl. 6 and that they had on behalf of the lessors served the lessee's agents with a notice to avoid disclaimer under s. 4, sub-s. 5, of the Landlord and Tenant (War Damage) Act, 1939. Throughout the correspondence which followed the lessors maintained that cl. 6 did not apply to war damage and on January 14, 1941, wrote a letter threatening to take proceedings for the recovery of the rent which they claimed to be due. On January 28, 1941, the lessee took out an originating summons to determine (1.) " whether on the proper construction of cl. 6 of the said "lease the [lessee] is entitled to exercise the option to determine "the said lease mentioned in the said clause in the event of "the flat comprised in the said lease or other parts of the "mansion therein mentioned having suffered war damage "(that is, damage caused by, or in repelling, enemy action) "so as to render the said flat unfit for occupation; (2.) whether "the said flat or other parts of the said mansion was or were "on or about September 9 or 10, 1940, destroyed or damaged "so as to render the said flat unfit for occupation within the "meaning of the said cl. 6; (3.) whether the notice dated "September 27, 1940, served on the [lessors] by the [lessee] "was effective to render the said lease void notwithstanding "the service of the notice of disclaimer dated September 10, "1940, served by the [lessee] on the [lessors] pursuant to "s. 4, sub-s. 2 (*a*), of the Landlord and Tenant (War Damage) "Act, 1939; (4.) whether, in the events which have happened, "the [lessee] has validly determined the said lease as from "September 9 or 10, 1940, pursuant to the said option."

Hayward for the lessee. The lessee was entitled to determine the lease under cl. 6. The flat was clearly " damaged " within the meaning of the clause, when it ceased to enjoy the services which the lessors had covenanted to supply, because it then became unfit for occupation, and, in any case, " other parts "of the mansion were damaged " and the unfitness for occupation resulted therefrom. The words in the clause " damaged "by any means " are wide enough to cover damage by enemy action, and such damage would not arise " by the act or "default of the lessee or any person being a servant of the "lessee or being in the flat with his . . . . permission." There is nothing in the Landlord and Tenant (War Damage) Act, 1939, which deprives the lessee of any right conferred on him by cl. 6.

Jopling for the lessors. The words " unfit for occupation "

MORTON J.
1941
JOHNSTONE v. SWAN ESTATES, LD.

in cl. 6 do not cover war damage. The purpose of the Act of 1939 is to take out of all contracts any obligation to repair war damage and to substitute for any contractual obligation a statutory provision under which a tenant can get rid of his lease, or can keep it and carry out repairs or a landlord can do the repairs, the tenant paying no rent in the meantime. The right conferred on the lessee by cl. 6 arises out of the non-fulfilment of an obligation to repair within the meaning of s. 1 of the Landlord and Tenant (War Damage) Act, 1939 (1). The lessee is thus deprived by the Act of his private right to terminate the lease under cl. 6. In *Boudou* v. *Thornton-Smith* (2) the court looked at the purpose of the Act as a whole, namely, to prevent anyone from suffering as the result of war damage. The lessee, having served a notice of disclaimer, cannot afterwards serve a notice under cl. 6 to terminate the lease. Such a course amounts to approbation and reprobation and is not open to him. [He referred to *Cooper* v. *Jax Stores, Ld.* (3).] Having invoked the procedure under the Act the lessee cannot proceed under cl. 6.

Hayward replied.

MORTON J. [after stating the facts and the questions raised by the summons:] I propose first to consider what were the contractual rights of the lessee in the events which have happened apart from the provisions of the Landlord and Tenant (War Damage) Act, 1939, and any notices served thereunder.

---

(1) By Landlord and Tenant (War Damage) Act, 1939, s. 1, sub-s. 1: "Where, by virtue of the "provisions (whether express or "implied) of a disposition or of "any contract collateral thereto, "an obligation (in this Part of this "Act referred to as an 'obligation "'to repair') is imposed on any "person to do any repairs in "relation to the land comprised in "the disposition, those provisions "shall be construed as not extending to the imposition of any "liability on that person to make "good any war damage occurring "to the land so comprised."

By sub-s. 4: "Where under the "foregoing provisions of this "section, an obligation to repair "is modified or suspended or an "obligation to make good war "damage as such is extinguished, "all rights and remedies (whether "by way of damages, forfeiture, "re-entry, sale, foreclosure or "otherwise) arising out of the "non-fulfilment of the obligation, "including all rights against any "person who has guaranteed the "fulfilment of the obligation, shall "be modified or suspended or "extinguished accordingly."

(2) [1941] 1 K. B. 561.

(3) [1941] 1 K. B. 577, 582.

On this footing I have no doubt that the lessee was entitled to terminate the lease and did so terminate it by the notice given on September 27, 1940. In arriving at a conclusion on this aspect of the case, the first question I have to consider is: Was the flat, or were other parts of the mansion, on September 9, 1940, destroyed or damaged by any means not arising by the act or default of the lessee or any person being a servant of the lessee or being in the flat with his express or implied permission? The answer to that question is that other parts of the mansion were so destroyed or damaged. No one could contend that the destruction or damage arose from the act or default of the lessee or any servant or licensee of his. It arose by enemy action. Secondly, did such destruction or damage to other parts of the mansion render the lessee's flat unfit for occupation? There was no physical damage to the flat itself, but, as a result of the damage to other parts of the mansion, from September 9, 1940, to November 20, 1940, it was totally without heat or artificial light of any kind, without cooking facilities and without hot water or the means of heating water, and the lessee was precluded by a covenant in the lease from permitting coal or coke to be delivered at the flat. Further, the lessee, who lived on the eighth floor of the building, was unable to use the lift. This state of affairs had lasted for eighteen days when the lessee gave his notice under cl. 6. I cannot think that on a reasonable interpretation of cl. 6 the flat was otherwise than unfit for occupation. The meaning of these words in the clause must be considered in relation to the subject-matter of the demise. This was a demise of a residential flat which was to be used, as appears from the recital and from the lessee's covenants, only as a private residence. There are elaborate regulations set out in the schedule to the lease to maintain the character of this block of flats, and there is a covenant by the lessee to observe all those regulations. The covenants by the lessors with regard to maintaining a hot water supply and hot water or steam to the radiators, and the covenants by the lessee with regard to the gas and electricity, the electrolux refrigerator, and the gas pipes and electric wires, all indicate that the parties attached importance to these services being maintained in working order. Having regard to the terms of the lease as a whole, and the subject-matter of the demise, I have no doubt that the flat was not fit for occupation within the meaning of cl. 6. It is true that life was not altogether impossible. The lessee might have brought in a stove for cooking purposes and, I suppose, might have procured candles to light the flat, if he were able to buy them, or an oil lamp, if he were able to buy it, but certainly that was not the kind of occupation which the parties contemplated. There is a further point, which is not without importance. The reference to other parts of the mansion being destroyed or damaged so as to render this particular flat unfit for occupation indicates to my mind, that the parties had in contemplation the kind of event which in fact happened, that is to say, the cutting off of the services to the lessee's flat by reason of damage to another part of the building. It is worthy of note, although it does not affect my decision, that the correspondence shows that the controversy was not whether the flat was unfit for occupation, but whether war damage was within the terms of cl. 6 of the lease. The notice, which was ultimately served, to avoid disclaimer amounts, in effect, to a recognition that the premises were unfit, as this notice has the result that there shall be implied in the lease a covenant by the landlord with the tenant that the land comprised in the lease shall be rendered fit so soon as is reasonably practicable after the service of the notice to avoid disclaimer.

Mr. Jopling, for the lessors, relies on three points to defeat the lessee's claim that his lease has been validly determined. First, he submits that the flat was not rendered unfit for occupation within the meaning of cl. 6. I do not think I need deal further with that matter. Secondly, he contends that, on the true construction of the Landlord and Tenant (War Damage) Act, 1939, and, in particular, of s. 1 of that Act, the lessee is not entitled to determine the lease under cl. 6. He argues that by the reference in the parcels to gas and water pipes and electric wires, coupled with the covenant in cl. 4, sub-cl. 4 and 5 of the lease, an obligation is imposed on the lessors to maintain the services in question and that the right conferred on the lessee by cl. 6 is a right "arising out of the "non-fulfilment of an obligation to repair" within the meaning of s. 1 of the Act. He submits that the scheme of the Act is to substitute the arrangements set out in the Act for all private contracts in the event of war damage, and he referred me to certain authorities as to the construction put on certain portions of this Act and as to the general interpretation of statutes. In my view, there is a short but sufficient answer to Mr. Jopling's argument. I think that the right conferred on the lessee by cl. 6 of the lease is not a right arising out of the non-fulfilment of a lessor's obligation to repair. It is a right independent of any obligation to repair, which arises by reason of the enemy having dropped a bomb on another part of the building and damaged it. It comes into existence because another part of the mansion has been destroyed or damaged by means not arising from an act or default of the lessee, his servants or licensees so as to render the flat unfit for occupation. Although I think this is a complete answer to Mr. Jopling's argument, it is to be observed further that the covenants by the lessors contained in cl. 4, sub-cl. 4 and 5, are qualified in the manner which I have indicated. If the lessors, for example, fail to supply hot and cold water to the flat or hot water or steam to the radiators, they are not liable for that failure. They are only under an obligation to do the necessary repairs within a reasonable period. I may add that as s. 1, sub-s. 4, of the Act affects contractual rights, I do not think it is legitimate to give it a wide construction, and to give it the construction for which Mr. Jopling contends would be to give it a wider meaning than its words justify.

Mr. Jopling's third point is that the tenant, by serving a notice to disclaim on September 10, 1940, has prevented himself from determining the lease under cl. 6. He suggested that, if the tenant were allowed so to do, he would be approbating

(1) [1941] 1 K. B. 577, 581.

and reprobating at the same time. On this part of his argument he referred me to *Cooper* v. *Jax Stores, Ld.* (1). That decision, as summarized, I think correctly, in the headnote, was as follows: "Where a notice of disclaimer "of a lease has been served under the Landlord and Tenant "(War Damage) Act, 1939, on the landlord by the tenant "on the ground of war damage to the premises and the "landlord serves on the tenant a notice to avoid disclaimer "and also of his intention to apply to the court for an order "under s. 11, sub-s. 1 (*c*), of the statute directing that, as the "premises were capable of beneficial occupation, rent should "be payable by the tenants in respect thereof, the landlord "cannot thereafter apply to the court under s. 6, sub-s. 1, "of the Act for a determination that the notice of disclaimer "was of no effect on the ground that the land comprised in "the lease was not unfit by reason of war damage at the time "when the notice of disclaimer was served." In that case, as the Master of the Rolls pointed out, the landlord would be approbating and reprobating, but, in my view, that decision has no application to the present case. Here the lessee first served a notice of disclaimer on September 10, 1940. The landlord's response to that was: "We cannot "accept, on behalf of our clients, your notice of disclaimer, "because the flat has been passed as fit for habitation." The lessee did not desire, I suppose, to embark on an argument whether or not the flat was "unfit" within the meaning of s. 4 of the Act, and he served his notice under cl. 6 of the lease. In each case the object and intention of his notice was to put an end to the lease. Moreover I cannot find that there is any estoppel raised by the acts of the lessee. It does not seem to me that there was any representation on the faith of which the lessors altered their position. For these reasons, I must reject Mr. Jopling's third argument also. The result is that I answer the questions raised by the summons in the affirmative.

Solicitors: *Ranger, Burton & Frost; Markby, Stewart & Wadesons.*

J. L. D.

SIMONDS J.

1941 Nov. 17, 18.

In re APEX SUPPLY COMPANY, LIMITED.

Hire-purchase — Liquidation of hiring company — Resumption of possession of goods by owners—Physical possession not taken—Goods held by third parties to order of owners—Bona fide agreement—Payment of compensation for depreciation of goods—Legality under bankruptcy laws—Penalty—Liquidated damages.

Under a hire-purchase agreement dated July 1, 1940, made between two companies for the purchase of certain goods, the hiring company agreed that, if they should go into liquidation and the owner company should retake possession of the goods before the expiration of nine months from the date of the agreement, they (the hiring company) would pay a further sum which, with the previous payments made by them, "shall equal the sum of "1020*l.* 12*s.* by way of compensation for the depreciation "of the said goods." On August 26, 1940, the hiring company went into liquidation and on September 11, 1940, the owner company purported to retake possession of the goods which were in the physical possession of a third company and remained so with the authority and at the request of the owner company. The owner company subsequently forwarded to the liquidators a proof for 676*l.* 4*s.*, the amount due to them under the above-mentioned provision. The liquidators rejected the proof. On a summons taken out by the owner company for an order reversing the decision of the liquidators:—

Held, that the owner company had effectively exercised their right to retake possession of the goods since, to do so, it was unnecessary for them to obtain physical possession of the goods and sufficient if the persons in whose physical possession they were should hold them to the order of the owner company and not to that of the hirers; that the agreement was a bona fide hire-purchase agreement and not a mere device by which the owner company obtained security for a loan; that the provision for the payment of compensation was not a fraud on the bankruptcy laws as giving the owner company an undue advantage in the event of the hiring company going into liquidation; and that the question whether the sum agreed to be paid as compensation was a penalty or liquidated damages did not arise, since it was a sum to become payable in a certain event, namely, the termination of the agreement as thereby provided, and not by way of damages for a breach of the agreement. *Semble*, even if it were the latter it was a genuine pre-estimate of damage.

Jones and Proudfoot on Hire-Purchase Law, 2nd ed., p. 107 (where the judgments in several unreported cases are set out), referred to.

SUMMONS.

On July 1, 1940, a hire-purchase agreement was entered into between Industrial Discount Co., Ld., and Apex Supply Co., Ld., for the hire by the Industrial company, on the hire-purchase terms therein set out, of certain articles of second-hand machinery. By cl. 2, sub-cl. 10, of the agreement it was provided that if the owners should retake the goods under cl. 2, sub-cl. 13, before the expiration of nine months from the date thereof the hirer would pay a further sum "which with the previous payments made "by him shall equal the sum of 1020*l.* 12*s.* by way "of compensation for the depreciation of the said goods." By cl. 2, sub-cl. 13, it was provided: "That if the hirer . . . . "being a company, shall go into liquidation, either compulsorily "or voluntarily, or if a receiver shall be appointed of the whole "or any part of its assets and undertaking, or if the hirer "shall enter into a composition or arrangement (whether "registered or not) with his creditors, or if he shall execute a "bill of sale of his effects or any of them, or if any execution or "distress shall be levied against him or any of his goods or "effects, or if he shall suffer any judgment or order against "him for the payment of money to remain unsatisfied or "uncomplied with, or if he shall do or suffer anything whereby "the owners' rights of ownership may be prejudiced, it shall "be lawful for the owners and their agents, without formal "demand, to enter any place in which the said goods may be "or the owners have reason to suppose that they are and to "seize and retake possession of the said goods and to remove "the same without prejudice to any other right of the owners "hereunder without being liable to any action or other "proceedings by the hirer or any person claiming through "him." By cl. 2, sub-cl. 14, it was provided that if, when the owners were entitled to resume possession of the goods, they were unable for any reason to obtain possession or to remove the goods the owners might terminate the agreement, provided that such determination should not affect the liability of the hirer in respect of any past breach. Clause 3 of the agreement provided that the hirer might determine the agreement, subject to giving seven days previous notice to the owners at their registered office of his intention so to do, by returning at the hirer's own cost the said goods in good repair and condition to the owners at such address as they should require, but that the hirer should remain liable for rent and damages (if any) for breach of his agreement up to the date of such return and for compensation (if any) under cl. 2, sub-cl. 10, thereof.

On September 4, 1940, the Industrial company received notice from the Official Receiver that a winding-up order had been made on August 26, 1940, against the Apex company, and on September 11, 1940, the Industrial company notified the Official Receiver that, under the terms of cl. 2, sub-cl. 13, of the agreement, they had retaken possession of the machinery and that the hiring of the machinery was, therefore, terminated. The Industrial company had not taken physical possession of the goods, as the Apex company had leased them to a third company, Newman Engineering, Ld., and that company had on July 18, 1940, taken possession of them under the lease and continued to use them after the date of the liquidation of the Apex company and to retain possession of them with the authority and at the request of the Industrial company. The Industrial company subsequently obtained judgments against Newman Engineering, Ld., for instalments provided for under an oral agreement and those judgments were satisfied. Before September 11, 1940, the Apex company had made payments to the Industrial company in respect of the machinery, amounting to 344*l.* 8*s.* and there was, therefore, due, under cl. 2, sub-cl. 10, of the agreement, 676*l.* 4*s.* On February 28, 1941, the Industrial company sent to the joint liquidators of the Apex company a proof of their claim in respect of that sum, but the liquidators, by a notice dated April 1, 1941, finally rejected the proof on the grounds that the hire-purchase agreement was absolutely determined on September 11, 1940, in professed exercise of the right of the owners under cl. 2, sub-cl. 14, which did not reserve the rights (if any) which might have, or might be alleged to have, accrued to the owners under cl. 2, sub-cl. 10, and, alternatively, that the sum which cl. 2, sub-cl. 10, of the agreement purported to make payable in the events there stated was in the nature of a penalty and not liquidated damages and was unenforceable. The Industrial company took out a summons asking for an order that the decision of the liquidators rejecting the proof might be reversed and that the proof might be allowed in full.

Sellers K.C. and *H. M. Pratt*, for the Industrial company. The first ground of rejection is a question of fact which has been cleared up in favour of the Industrial company by the evidence. As to the point whether the sum is claimed by way of liquidated damages or penalty, no such question arises since all that the agreement provides is for the payment of a sum of money in a certain event. If, however, that contention is wrong, it is submitted that the payment would be by way of liquidated damages and the proof would be admissible. The point has been considered in several unreported cases of which the judgments are to be found in Jones and Proudfoot on Hire-Purchase Law, 2nd ed., p. 107. *Associated Distributors, Ld.* v. *Hall* (1) and *Moss Empires, Ld.* v. *Olympia (Liverpool), Ld.* (2), were also referred to.

Winterbotham, for the Apex company. As to the first ground on which the proof was rejected, the applicants did not in any real sense retake possession of the property under cl. 2, sub-cl. 13, because on September 11, 1940, when they purported to do so, the property was already in the physical possession of a third company. With regard to the second ground the payment must be in the nature either of a penalty or of liquidated damages. There is no evidence of any effort having been made to pre-estimate the damages. Each case must be decided on its own facts, but *Associated Distributors, Ld.* v. *Hall* (1) shows the distinction between the case where the hirer terminates the agreement and where the owner terminates it. The sum here made payable is in the nature of a penalty. [He also referred to *Dunlop Pneumatic Tyre Co., Ld.* v. *New Garage and Motor Co., Ld.* (3).] Further, the transaction in substance was not a hire-purchase agreement, but merely a

(1) [1938] 2 K. B. 83.
(2) [1939] A. C. 544.
(3) [1915] A. C. 79, 86.

scheme on the part of the Industrial company to obtain security for a loan: see *In re Watson* (1). It is also a fraud on the bankruptcy laws, being an arrangement under which a sum became payable on the liquidation of the company and not otherwise. [He referred to *In re Johns* (2).]

Simonds J. [after stating the facts:] In addition to the two grounds on which the liquidator rejected the proof, counsel for the Apex company has been allowed to put forward two further grounds, first, that the agreement, though in form a hire-purchase agreement, was not, in truth and in substance, such an agreement, but a mere device to give the Industrial company some form of additional security so that the document was in substance an unregistered bill of sale; and, secondly, that the provisions of the agreement on which the Industrial company relies are in fraud of the bankruptcy laws as being merely an attempt to give to the Industrial company, in the event of the Apex company's liquidation, something which but for that liquidation they would not have had.

I must examine briefly the several grounds on which it is claimed that this proof should be rejected. In my view, the first ground—that the Industrial company did not effectively exercise the right given by cl. 2, sub-cl. 13, of the agreement to seize and retake possession of the goods—is based on a misconception. The goods in question were at all relevant times in the physical possession of a company called Newman Engineering, Ld. Before September 11, 1940, they were in possession of that company as lawfully claiming through the Apex company. It is quite clear that from and after September 11, 1940, they remained in possession of the Newman company as claiming through the Industrial company. That from that date they derived title from the Industrial company is abundantly clear from the fact that in subsequent proceedings the Industrial company asserted their title and recovered judgment against the Newman company. It is not necessary, in order that possession may be effectively retaken under cl. 2, sub-cl. 13, that the Industrial company should obtain physical possession of the goods. It is sufficient that the nature of the possession of the person in whose possession the goods are should change so that henceforth he holds to the order of the Industrial company and not to the order of the hirer. Therefore, the first ground of rejection, in my judgment, fails.

---

(1) (1890) 25 Q. B. D. 27, 35.

(2) [1928] Ch. 737.

I defer consideration of the second ground on which the liquidators have rejected the proof, and turn to the ground put forward by learned counsel, that in substance this was not a hire-purchase agreement but a device by which the Industrial company obtained security for a loan. I am satisfied that the Industrial company were the purchasers of the goods and, as purchasers of the goods and owners of the goods, entered into the hire-purchase agreement, and that that ground of rejection also fails.

The contention that the provision on which the Industrial company relies is bad as being a fraud on the bankruptcy laws is based on the well-known principle on which Tomlin J. relied in *In re Johns* (1), where he cites a passage from the judgment of Mellish L.J. in *Ex parte Mackay* (2). " As I understand it, "a person cannot make it a part of his contract that, in the "event of bankruptcy, he is then to get some additional "advantage which prevents the property being distributed "under the bankruptcy laws." The same principle is stated in *Ex parte Williams* (3), also cited by Tomlin J. In the case before him Tomlin J. came to this conclusion: "I think "the true inference to be drawn from the consideration of this "document before me—just as the true inference was drawn "in *Ex parte Williams* (3)—is that here there is a deliberate "device to secure that more money should come to the mother "if the son went bankrupt, than would come to her if he "did not; and, that being so, it seems to me that the device "is bad." I see no ground whatever for supposing that the provision in this case was aimed at anything of that kind. The claim which the Industrial company are putting forward is based on cl. 2, sub-cl. 10, of the agreement, which provides

(1) [1928] Ch. 737.
(2) (1873) L. R. 8 Ch. 643, 648.
(3) (1877) 7 Ch. D. 138.

that, if the hirer shall return the goods under cl. 3, sub-cl. 1, or, if the owners retake the same under cl. 2, sub-cl. 13, the claim which they now put forward is to arise. That claim arises in a multitude of circumstances, one only of which is the possible liquidation of the company, and it would be extravagant, in my view, to suggest that this clause is aimed at defeating the bankruptcy laws or at providing for a distribution differing from that which the bankruptcy laws permit. Accordingly, that ground of rejection also must fail.

I come finally to the ground of rejection which has caused me most difficulty. It is said that the payment provided for by cl. 2, sub-cl. 10, is in the nature of a penalty and not liquidated damages, and, accordingly, is not enforceable in this court. This matter does not come before the court for the first time, although, unfortunately as I think, the reports do not contain any report of the numerous cases in which a clause of this kind has been considered by the court. I have, however, had the advantage of reading a transcript of the shorthand notes of several cases which are conveniently to be found in Notes on Hire-Purchase Law, by Jones and Proudfoot, 2nd ed., p. 107, et seq.

The first case was *Elsey & Co., Ld.* v. *Hyde* (p. 107), which came before a Divisional Court of the King's Bench Division consisting of Salter and Fraser JJ. There the court had to consider a hire-purchase agreement which was not in any material respect distinguishable from the agreement in the present case, and the claim was brought to recover a sum of money under two clauses, which do not differ materially from sub-cls. 10 and 13 of cl. 2 of the agreement which I have to consider. Salter J. said (at p. 111): "Now this action is "brought under cl. 6 to recover in each case the difference "between the sums which have been paid, the original 5*l.* and "the sums paid since—it is the difference between those sums "and 25*l.* The learned [county court] judge has held that "the amount is not recoverable, because this is a penalty. "I think the question whether it is a penalty or not is clearly a "question of law. The question is whether he is right in law "in so holding. As I understand, the question whether the

SIMONDS J.

1941

APEX SUPPLY CO., *In re.*

"sum of money which the parties have agreed shall, in certain "events, be paid by one to the other is a penalty or not, and "whether that agreement is, therefore, enforceable is a question "which arises, in cases where the contract provides that if one "party has done something which he ought not to do and which "had prejudiced the other, it would give the other the right to "damages against him. Then, where the parties have purported "to fix the amount of damages, the question is whether that is "a genuine agreement liquidating the damage, or whether it is "an oppressive thing and not, as has been called, a genuine "pre-estimate of damage. But those questions arise, as I "understand, in cases where the person who is to pay has "broken a contract with the other or done something which "entitles the other to damages against him. This question "is whether the person injured can sue on the contract for "the agreed sum or whether he should be remitted to his "rights and show what damage he has sustained, which may, "of course, be more or may be less than the agreed sum. My "difficulty in this case has been to see that this is a case of "penalty at all or that it comes within that principle. I test "the matter by looking at cl. 6 and looking at the various events "in which this money is to be paid. It may be said there are two "events, or it may be said that there is only one. The event "in which it is possible [? payable] is the termination of the "hiring during the first eight months. That would be within "the first two-thirds of the normal period. It is in that "event that this money is to be paid. It might be said "that there are two events because the hiring may be "determined either by the hirer or the owner. It is, I think, "to be observed that in order to make cl. 6 apply where the "determination of the hiring is by the owner, it must be "under cl. 8, and that there is no right to this money where "the hiring is determined by the hirer under cl. 14. In "asking myself whether this is a penalty or not, I take the "first event in which this money is to be paid . . . . Clause (*a*) "provides: 'The hirer may terminate the hiring at any time "'by returning the article to the owners at such address as "'they may direct at his own risk, cost and expense, but the "'hirer shall remain liable for rent up to the such return "'[sic] (including apportioned rent for any broken period) "'and damages, if any, for any breach of this agreement, "'compensation, if any, under cl. 6 hereof, and also any other "'moneys then payable under this agreement.' Supposing "the hirer exercises his right to terminate this hiring, how can "it be said that this sum of money, which it is agreed shall "be paid, is a penalty or that it is a case in which either "the agreed sum or liquidated damages must be paid? If "the hirer terminates this agreement, what right does that "give the owner to recover any damages against him? He "has done him no wrong, he has broken no contract, and I am "quite unable to see that this sum would or could give a "penalty if it were claimable in those circumstances. It "appears to me to be a strange conclusion, if this money is to "be regarded as a penalty, where it was payable in one event "and not regarded as a penalty where it was payable in another "event. I think, therefore, as it is to my mind not a penalty "where it is payable on the return of the article by the hirer, "it ought not to be regarded as a penalty where it was payable "on the retaking of the article by the owner." If I may pause there in the reading of the learned judge's judgment, it exactly covers the case I have to consider to-day, and, if that stood alone, I do not think I should be justified in taking a view on this common commercial document different from that which the learned judge took, a view from which, as I shall show, no dissent has been expressed by any court before which the matter has come. The learned judge continues: "Then the next case I take is where the money is paid on the "determination of the hiring by the owner, not as in this case "in consequence of the conduct of the hirer which is a breach "of contract, but in consequence of the happening of an "event which is not a breach of the contract. For example, "supposing the owner justifies his right to retake under cl. 8 "because execution has been issued against the hirer. There "is no wrong done by the hirer to the owner, and it is no "breach of any contract which the hirer has made with the "owner. How could that event give to the owner of the goods "any right to recover damages against the hirer, liquidated "or unliquidated? It appears to me that no question of "penalty could arise in such a case, and if this sum is not a "penalty where it is payable on the determination of the hiring "by the owner, by reason of the levy of execution, it seems "to me it would be a strange result if it were to be held a penalty "where it is payable on the termination of the hiring by the "owner on the ground of non-payment of rent by the hirer. "That is this case. Then there is a third case I take, and that "is this one, where the hire is determined by the owner, "because the hirer is in arrear with his payments. It is proved "that this is a breach of this contract, and it is proved that "that breach, apart from any termination of the hirer, would "give the owner a right to damages against the hirer. "But what would those damages be? They would be interest "on the amount unpaid and nothing more. The fact that the "hirer is in arrear with his payments will not entitle the "owner to any damages for depreciation of these things. The "reason that they have suffered is that they have second-hand "goods put on their hands before they have received very much "money in respect of them. That is not the result of the "hirer's breach of contract, in being late in his payments, it "is the result of their own election to determine the hiring, "and it appears to me, even in this case, there is no question "of penalty at all, and there is no question whether the sum "paid shall be regarded as liquidated damages or a penalty." The learned judge then considers what the position would be if he had to choose between penalty and damages, that is to say, whether it was truly a penalty or a pre-estimate of damage, and he comes to the conclusion that the true view is that it would be a pre-estimate of damage. Fraser J. agreed with what Salter J. had said.

The next case cited, namely, *Chester & Cole, Ld.* v. *Avon* (p. 115), came before Hawke J. in May, 1929. The decision of Salter and Fraser JJ. which I have just read, was brought to the notice of Hawke J. He did not add anything, but it is clear that he approved of the judgment which I have read. Then *Roadways Transport Development, Ld.* v. *Browne & Gray* is cited

(p. 118), which came before the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) in May, 1927. The point to which I have just referred was not taken before that court, so they did not have to consider whether in truth no question of penalty or liquidated damages arose. They directed their attention to the point whether the sum was a penalty or a pre-estimate of damage and they came unanimously to the conclusion that it was a genuine pre-estimate of damage and not a penalty. That has no bearing on the point which I am immediately considering, but it has a considerable bearing on the view which I should feel bound to take if I came to the conclusion that that was the problem which I had to solve, for, although it is true that there is some distinction to be drawn between the nature of the goods, the subject of the hire-purchase agreement in that case, and those the subject of the hire-purchase agreement in the present matter, yet I should regard the decision of the Court of Appeal as a valuable lead here. It is, I think, important, although, of course, each case must be judged on its own facts and on its own merits, not to be over-subtle in refinement in dealing with commercial documents of this kind and it appears to me to be undesirable, if the court has come to a certain conclusion in relation to a certain class of goods the subject of a hire-purchase agreement, easily to come to any other conclusion with regard to a different class of goods the subject of a similar agreement.

I turn to the last case cited, *Chester & Cole* v. *Wright* (p. 124), which case came before Lord Hanworth M.R. and Greer L.J., sitting as additional judges of the King's Bench Division and constituting a Divisional Court. There, it would appear, two points were argued, namely, first, whether the question of penalty or liquidated damages arose at all, and, secondly, if it did, whether the sum agreed was a penalty or liquidated damages. As I read the judgment of Lord Hanworth, he did not deal with the first point, but he came to the conclusion, on the question whether the sum agreed was a penalty or liquidated damages, that it was a pre-estimate of damage and, accordingly, the payment was enforceable. Greer L.J. came, though with difficulty, to the same conclusion, but he expressed himself on the first point and I consider what he said as of the greatest importance, if not strictly a binding authority, having regard to the fact that the court came to a conclusion on the other point. Greer L.J. said (at p. 130): "The second question to be determined is a little more "difficult. It is whether the sum of 95*l.*, diminished by the "amounts already paid, is to be deemed to be a penalty for "breach of a contract, and not damages, or, as may well be, "that it is neither one nor the other, that it is neither a penalty, "nor is it liquidated damages, but it is a sum which, in con-"sideration of getting the use of this car, the hirer promised "to pay in a certain event, that event being the determination "in one way or another of the hiring agreement. There is "no reason in law why, for a sufficient consideration, there "should not be on the same document two contracts, one a "contract to hire the motor-car on the terms of the agreement, "and another, a contract that if that agreement comes to an "end, then a certain sum will be payable by the hirer; and "it may very well be that the view which is, I think, the view "of Salter J., in *Elsey & Co., Ld.* v. *Hyde*, which was cited "before us, is the right way to look at this clause, namely, "that it is not either liquidated damages or a penalty, but it "is a sum payable in respect of one event, namely, the deter-"mination and end of the hiring agreement, whether that end "of the hiring agreement arises from the hirer delivering the "car back again, or whether it arises from the owner taking "it out of the possession of the hirer in the events in which "he is entitled to take it out." At any rate, the Lord Justice does not dissent from, but rather gives his approval to, the reasoning of Salter J. in the earlier case in construing an agreement which in no material way differs from that which I have to construe. Accordingly, whatever my own view might be, I should feel bound to give to this document the same meaning, and to come to the conclusion that here no question of penalty versus liquidated damages arises, but that this is a contract for the payment of a certain sum in a certain event and, that event having happened, that sum is payable. I would only add that, if I had to come to a conclusion on the second question, whether this was a penalty or a pre-estimate of damage, then, guided by the line of reasoning which influenced the Court of Appeal in the third of the four cases to which I have referred, I should come to the conclusion that the present was a case not of penalty but of genuine pre-estimate of damage. I have only to add that, when *Associated Distributors, Ld.* v. *Hall* (1) came before the Court of Appeal, that court was concerned with a case where, under such an agreement as this, the hirer elected to terminate the agreement, and in those circumstances the court, having been referred to the unreported cases set out in Jones and Proudfoot on Hire-Purchase Law, came to the conclusion that no question of penalty or liquidated damages arose. Scott L.J. was careful to keep open the question what might be the view of the court if the agreement had been terminated not by the hirer but by the owner, but in that judgment there is not one word of disapproval of the reasoning of Salter J. in *Elsey & Co., Ld.* v. *Hyde.*

Accordingly, all the four grounds on which it is sought to reject this proof having failed, I must allow this application and direct the liquidators to admit the proof. The liquidators will pay the costs.

Solicitors: *Perowne & Co.; Hugh-Jones & Flinn.*

---

(1) [1938] 2 K. B. 83.

J. L. D.

In re MARGOT BYWATERS, LIMITED.

SIMONDS J.

1941 Nov. 24.

Company—Voluntary liquidation—Previous distress—Indebtedness for purchase tax—Distress authorized by Commissioners of Customs and Excise—Stay of distress—Purchase Tax (*No.* 2) *Regulations,* 1940 (*St. R. & O., No.* 2194 *of* 1940), *reg.* 11, *sub-reg.* 1.

When a company goes into voluntary liquidation a distress or execution put in force against its goods is not thereby rendered void, but if the liquidator seeks to have the proceedings stayed the court will grant a stay unless there are exceptional circumstances to justify the distress continuing.

Where there was a large deficiency in the assets of a trading company liable to pay purchase tax, which was admittedly not an assessed tax and therefore not a preferential debt, under s. 264 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), to the Commissioners of Customs and Excise, the fact that the commissioners had refused an offer by a nominee of some of the directors to buy its debts for 17*s.* 6*d.* in the pound, which had been accepted by the trade creditors, did not constitute an exceptional circumstance justifying the continuance of a distress levied by the commissioners.

MOTION.

Margot Bywaters, Ld., became liable to pay the Commissioners of Customs and Excise 501*l.* in respect of purchase tax imposed by the Finance (No. 2) Act, 1940. Under reg. 11, sub-reg. 1 of the Purchase Tax (No. 2) Regulations, 1940 (1), made in pursuance of s. 33, sub-s. 1 (*g*), of the Act, the commissioners authorized Philip Squibb and Richard Lloyd, two of their officers, to levy a distress on the company's goods to raise that sum. The company was then in voluntary liquidation. There was a large estimated deficiency of assets, so that the company's creditors, if the assets were distributed among them, could not expect a dividend of more than about 5*s.* in the pound. One Heimann, a nominee of some of the directors of the company, made an offer to the trade creditors and the commissioners to buy their debts for 17*s.* 6*d.* in the pound. The trade creditors accepted, but the commissioners declined. The liquidators now sought a declaration that the commissioners were not entitled to levy the distress.

---

(1) By the Purchase Tax (No. 2) Regulations, 1940, reg. 11, sub-reg. 1: "(*a*) If upon demand made by "the collector a person neglects "or refuses to pay in accordance "with the last preceding regula-"tion tax which he is thereby "required to pay, the commission-"ers may direct the collector, for "non-payment thereof, to distrain "on the goods and chattels of "such person, and where the "commissioners so direct, the "collector may by warrant signed "by him authorize any officer of "customs and excise to levy such "distress. (*b*) The provisions of "sub-ss. 2 to 5 of s. 162 of the "Income Tax Act, 1918, shall "have effect in relation to any "such distress as they have effect "in relation to the distress under "sub-s. 1 of the said section with "the substitution for references "to a collector of references to an "officer of customs and excise "and for the reference to the "general commissioners of a "reference to the Commissioners "of Customs and Excise."

V. R. Aronson for the liquidators. The commissioners cannot have the right to distrain now that the company is being wound up as that would give their claim for purchase tax a priority which would be inconsistent with s. 264, sub-s. 1 (*a*), of the Companies Act, 1929, whereby priority is given in a winding-up to rates, assessed taxes, land tax, property and income tax. Further, by s. 174, sub-s. 1, of that Act, where a company is being wound up by the court any distress put in force against its effects is void after the commencement of the winding-up. In the notes to this section in Buckley on the Companies Acts, 11th ed., p. 398, it is said: " Semble, the section applies in a voluntary winding-up "and, at any rate, the joint effect of the sections of the Act of "1908 and the earlier Acts corresponding to ss. 247, 252, 177 "and 174 of this Act is to make the principle of this section "applicable to this case." On that view the voluntary winding-up in this case automatically put an end to the distress. [He referred to *Thomas* v. *Patent Lionite Co.* (1); *In re Thurso New Gas Co.* (2); *Westbury* v. *Twigg & Co., Ld.* (3); *Food Controller* v. *Cork* (4).] Even if this distress is not automatically made void by the winding-up, the court should not allow it to continue, as there are no special circumstances justifying such a course.

Danckwerts for the commissioners. It is not disputed that as regards a debt for purchase tax the Crown has no prima facie priority since it is not an "assessed tax" within s. 264,

(1) (1881) 17 Ch. D. 250.
(2) (1889) 42 Ch. D. 486, 489.
(3) [1892] 1 Q. B. 77.
(4) [1923] A. C. 647.

SIMONDS J.

1941

MARGOT BYWATERS, LD., *In re.*

sub-s. 1 (*a*), of the Companies Act, 1929. Neither is it disputed that, unless there are exceptional circumstances, distresses are stayed by the court in a voluntary winding-up so as not to disturb equality of division among the creditors. It is disputed, however, that in a voluntary winding-up there is any automatic stay of the distress. The statement in Buckley on the Companies Acts is mistaken on that point. There is no stay till the liquidator takes out a summons under s. 252 of the Act. Sects. 174 and 177 in terms apply only to a compulsory winding-up: see *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.* (1) and *Gerard* v. *Worth of Paris, Ld.* (2). In the present circumstances it is only fair that the distress should be allowed to proceed. Money from the taxpayers has got into the hands of the company and no injustice will be done to anyone if it is recovered by the commissioners. The commissioners were entitled to refuse the offer by Heimann to buy the company's debts for 17*s.* 6*d.* in the pound, and they should be allowed to recover what is due to them by the distress.

SIMONDS J. [having stated the facts:] In this case I have to decide whether the commissioners ought to be allowed to proceed to levy the distress. The company is in voluntary liquidation and, therefore, s. 174 of the Companies Act, 1929, which provides that, in the case of a compulsory liquidation, "any attachment, sequestration, distress or execution put in "force against the estate or effects of the company after the "commencement of the winding-up shall be void to all intents," does not expressly apply, that is to say, the distress is not automatically avoided by the liquidation. Where the liquidation is voluntary it is necessary for the liquidator to come to the court to have the distress proceedings stayed, and the court will stay them unless there be extraordinary reasons or exceptional circumstances which justify their continuance. Are there here such exceptional circumstances as to justify the court in allowing the distress to proceed? In my judgment, there are not. I can find nothing to justify the

---

(1) [1924] 2 K. B. 410, 418.

(2) (1936) 80 Sol. J. 633.

SIMONDS J.
1941
MARGOT BYWATERS, LD., *In re.*

court in so doing in the fact that Mr. Heimann made his offer, which appears to be generous, although I dare say not wholly altruistic, to purchase the debts of creditors at 17s. 6*d.* in the pound. He stands in their shoes, and I am unable to find in the fact that the Crown has thought it proper to refuse his offer any reason why as against him the Crown should be in a better position than it would be against the creditors in whose shoes he stands. Therefore, there is no such extraordinary reason as would justify me in allowing the distress to proceed. It is not contended on behalf of the Crown that this is an assessed tax with regard to which preference is given by s. 264 of the Companies Act, 1929, and, therefore, this case does not differ from any other case in which a creditor who is not entitled to any preference is seeking in a liquidation to enforce otherwise than by proof his claim against a debtor. I will declare that the commissioners are not entitled to levy a distress on the property of the company.

Solicitors: *Philip Taylor & Co.; Solicitor for the Customs and Excise.*

F. C.

UTHWATT J.
1941
Nov. 18, 19.

In re HUNTER'S LEASE.

GILES *v.* HUTCHINGS.

Landlord and tenant—Lease—Determination—Power to lessee to determine—Covenant by lessor to pay sum to lessee on end or determination of lease—Power to lessee to hold over and call for new lease on same terms if lessor unwilling to pay—Assignment of reversion—Liability of assignee.

A covenant by a lessor to pay a sum to the lessee on the expiration or sooner determination of the lease does not touch and concern the interest which is the subject-matter of the lease and so does not bind the assignee of the reversion, even if the lease provides also that, should the lessor be unwilling to pay the sum, the lessee may hold over and demand a new lease on the same terms, including the term as to payment. The primary obligation is that of the lessor to pay the sum. The holding over and demanding a new lease is merely an alternative course which can be taken only on agreement by both parties, neither of whom can force a new tenancy on the other. To hold that the burden of the covenant runs with the reversion would be to extend the operation of the rule (stated by the Court of Appeal in *Woodall* v. *Clifton* [1905] 2 Ch. 257, to be anomalous), that a covenant to renew touches and concerns the thing demised.

Thomas v. *Hayward* (1869) L. R. 4 Ex. 311; *Dewar* v. *Goodman* [1908] 1 K. B. 94; *Inchiquin* (*Earl of*) v. *Burnell* (1795) 3 Ridg. Parl. Cas. 376; and *Hill* v. *Booth* [1930] 1 K. B. 381, considered.

ADJOURNED SUMMONS.

By a lease dated December 1, 1930, Samuel Hunter, the lessor (which word was to be deemed to include, when the context admitted, the owner for the time being of the reversion) demised certain premises to Henry Bowden Giles, the plaintiff on this summons, for five years from December 29, 1930. The lease provided that the lessee could determine it by three months' notice in writing, and that, at the expiration or sooner determination of the term, the lessor should forthwith pay 500*l.* to the lessee. Should the lessor be unwilling to pay that sum, the lessee might continue in occupation if he wished, in which case the lessor was to grant him a new lease for five years with the like conditions as to determination and as to payment of 500*l.* At the end of the lease the lessor was unwilling to pay the 500*l.* and the lessee continued in occupation for a further five years, but without a new lease. By a conveyance dated November 24, 1938, Ernest Hutchings, the defendant to this summons, became the owner of the reversion. At the end of the further term he was willing to continue the tenancy, but the lessee was not, and he gave up possession. The lessee contended that the reversioner thereupon became bound to pay him the 500*l.* The reversioner denied liability, whereupon the lessee, with the reversioner's acquiescence, took out this summons to determine whether or not the reversioner was liable.

His Lordship held, that, on the true construction of the lease, there was a liability to pay the 500*l.*, and the reversioner thereupon raised the point that he, in any event, was not bound to pay it, since the burden of the covenant did not run with the reversion so as to bind an assignee thereof

Rose for the reversioner. This is merely a collateral covenant, and does not touch and concern the reversion. It is a purely personal covenant, and does not bind the assignee: see Halsbury's Laws of England, 2nd ed., vol. xx., p. 358, note (*l*), and the cases there cited. *Inchiquin* (*Earl of*) v. *Burnell* (1) is precisely in point here and is in favour of the reversioner. It was there held that a covenant by a lessee, his heirs and assigns, to pay a fine of 40*l.* on the expiration of a term of 61 years, did not amount to a reservation obliging the tenant in possession to pay the fine. [UTHWATT J. In *Hill* v. *Booth* (2) the argument was based on s. 141, sub-s. 1, of the Law of Property Act, 1925 (15 Geo. 5, c. 20) (3).] In *Woodall* v. *Clifton* (4) the Court of Appeal, in a judgment delivered by Romer L.J. said: ". . . . the fact that a covenant to renew "should be held to run with the land has by many been con"sidered as an anomaly, which it is now too late to question, "though it is difficult to justify." In *Davis* v. *Town Properties Investment Corporation, Ld.* (5), a lease for 14 years was granted to the plaintiff by the freeholder who later assigned the reversion to the defendants. The lease contained a covenant for quiet enjoyment, and the defendants bought and pulled down an adjacent building and erected a new one which caused interference with the plaintiff's enjoyment. It was held that the defendants were not liable for breach of the covenant, and Romer L.J. made the interlocutory observation: "The lessor "had no power to bind the person entitled to the reversion "except in relation to the reversion." In *Thomas* v. *Hayward* (6), it was held that a lessor's covenant restricting him from competing with the business which the lessee covenanted to carry on in the demised premises did not run with the land so as to enable the assignee of the lease to sue the lessor on it. In *Dewar* v. *Goodman* (1), the Court of Appeal approved that decision.

---

(1) (1795) 3 Ridg. Parl. Cas. 376.

(2) [1930] 1 K. B. 381.

(3) Sect. 141, sub-s. 1: "Rent "reserved by a lease, and the "benefit of every covenant or "provision therein contained, hav"ing reference to the subject"matter thereof, and on the "lessee's part to be observed or "performed, and every condition "of re-entry and other condition "therein contained, shall be an"nexed and incident to and shall "go with the reversionary estate "in the land, ... immediately "expectant on the term granted "by the lease, ..."

(4) [1905] 2 Ch. 257, 279.

(5) [1903] 1 Ch. 797, 801.

(6) (1869) L. R. 4 Ex. 311.

Bowles for the lessee. This covenant does run with the reversion, and the reversioner is bound under it to pay the 500*l.* Although s. 142, sub-s. 1, of the Law of Property Act, 1925 (2), contains the words "with reference to the subject-"matter of the lease," those words have no technical meaning. This covenant to pay 500*l.* is bound up with and inseparable from the covenant to renew and the question how long the term is to last. It is a condition on which depends the duration of the lessee's interest, and any covenant affecting the duration of the term must run with the reversion: *Roe d. Bamford* v. *Hayley* (3). In the present case the whole object of paying the 500*l.* is bound up with the lessee's interest and cannot be separated from it. [He referred to *Howard de Walden* (*Lord*) v. *Barber* (4).]

UTHWATT J. The effect of the judgment on the construction of the lease which I have already delivered is that, at the expiration of the term of five years granted by the lease the lessor came under an obligation to pay to the lessee 500*l.* subject to the qualification that, if the lessor did not for any reason wish to pay that sum and the lessee was willing to acquiesce in non-payment, the lessee might continue in occupation, whereupon the lessor became bound to grant to the lessee a further lease of the demised property for a further term of five years, such new lease to contain all the provisions of the original lease.

---

(1) [1908] 1 K. B. 94.

(2) Sect. 142, sub-s. 1: "The "obligation . . . . of a covenant "entered into by a lessor with "reference to the subject-matter "of the lease shall, if and as far as "the lessor has power to bind the "reversionary estate immediately "expectant on the term granted by "the lease, be annexed and incident "to and shall go with that rever-"sionary estate . . . . and may be "taken advantage of and enforced "by the person in whom the term "is from time to time vested . . . . "and if and as far as the lessor has "power to bind the person from "time to time entitled to that "reversionary estate, the obliga-"tion aforesaid may be taken "advantage of and enforced "against any person so entitled."

(3) (1810) 12 East 464.

(4) (1903) 19 Times L. R. 183.

I have now to determine whether the reversioner is bound, under that covenant, to pay 500*l.* to the lessee, for the lessee did not desire to continue in occupation at the expiration of the second term and insisted on performance of that obligation. In the lease, "the lessor" is defined as including "the estate "owner or estate owners for the time being of the reversion "of the premises hereby demised expectant on the term "hereby granted." Thus, the lease by its terms as a matter of English throws on the lessor for the time being the obligation to pay the 500*l.* But that is not conclusive. The question is whether the burden of that obligation passes on the assignment of the reversion. The position, as I understand the matter, is that at common law the assignee of a reversion is not liable to the lessee in respect of any of the covenants and conditions in the lease. That appears to be the orthodox view and is so stated in Williams's Notes to Saunders' Reports, vol. i., p. 300, note (10.) In those circumstances the statute of 32 Henry 8, passed in 1540, provided, in substance, that lessees were to have the like remedies on covenants and conditions contained in the lease against assignees of the reversion as they had against the original grantor of the lease. That Act was replaced by s. 11 of the Conveyancing Act, 1881, and the provision now in force is in s. 142 of the Law of Property Act, 1925. Before the passing of the Conveyancing Act, 1881, it had been decided that the burden of covenants by the lessor contained in a lease did not pass to his assignee unless those covenants touched and concerned the thing demised, and there is authority for the view that the Conveyancing Act, 1881, and the Law of Property Act, 1925, have left the law as it was before the Act of 1881.

There arises, therefore, the old question, whether the covenant touches and concerns the thing demised. On the question whether particular covenants by lessees touch and concern the thing demised there is a wealth of authority. There is less authority in the case of covenants by lessors, which are less common than covenants by lessees, but it appears to me that the principles governing the two classes of case are the same. Several authorities have been cited to me directed to showing what is meant by the phrase "touch "and concern the thing demised." One important authority is *Thomas* v. *Hayward* (1), the headnote of which is: "Where "in a lease, the lessee having covenanted to use the demised "premises as a public-house, the lessor covenants not to "build or keep any house for the sale of spirits or beer within "half a mile of the demised premises; the lessor's covenant "does not run with the land so as to enable the assignee of "the lease to sue him upon it." Channell B. put the point of the decision quite shortly. He said (2): "A covenant runs "with the land only when it touches, that is, when its operation "directly, and not merely collaterally, affects the thing "demised. It cannot be said that this covenant does so." That case was approved by the Court of Appeal in *Dewar* v. *Goodman* (3). I have no doubt that, if the covenant in the present case had been merely a covenant by the lessor to pay a sum of 500*l.* on the expiration or sooner determination of the lease, the burden of it would not have fallen on the assignee of the reversion. The interest included in the demise would not be affected by such a covenant. Valuable as such a covenant might be to the lessee, it would not in any sense touch and concern the interest which is the subject-matter of the lease. As I understood Mr. Bowles, he was not prepared to dispute this, and, indeed, in the light of *Inchiquin (Earl of)* v. *Burnell* (4) and *Hill* v. *Booth* (5) he could not well do so. But he contended that this covenant for the payment of 500*l.* was never intended to stand alone, that it was merely part of the arrangement which governed the continued occupation by the lessee of the premises under the lease, that it is erroneous to regard the lessee as having a lease for a term of five years only, and that in truth what the lessee had in substance was much more, namely, a lease of five years which he had a right to continue, the lessor being entitled to avoid that right by paying 500*l.* He argued, with some force, that, if a covenant for renewal touches and concerns the thing demised, this covenant, too, does so.

---

(1) L. R. 4 Ex. 311.
(2) Ibid. 312.
(3) [1908] 1 K. B. 94.
(4) 3 Ridg. Parl. Cas. 376.
(5) [1930] 1 K. B. 381.

I regret that I cannot accept that argument. I must bear in mind what was said by the Court of Appeal in *Woodall* v. *Clifton* (1). In that case Romer L.J., delivering the judgment of the court on the question whether an option to purchase contained in a lease ran with the land so that an assignee of the lease could take advantage of it, said: "The covenant is "aimed at creating, at a future time, the position of vendor "and purchaser of the reversion between the owner and the "tenant for the time being. It is in reality not a covenant "concerning the tenancy or its terms. Properly regarded, it "cannot, in our opinion, be said directly to affect or concern "the land, regarded as the subject-matter of the lease, any "more than a covenant with the tenant for the sale of the "reversion to a stranger to the lease could be said to do so. "It is not a provision for the continuance of the term, like a "covenant to renew, which has been held to run with the "reversion, though the fact that a covenant to renew should "be held to run with the land has by many been considered "as an anomaly, which it is too late now to question, though "it is difficult to justify. An option to purchase is not a "provision for the shortening of the term of the lease, like a "notice to determine or a power of re-entry, though the result "of the option, if exercised, would or might be to destroy "the tenancy. It is, to our minds, concerned with something "wholly outside the relation of landlord and tenant with "which the statute of Henry 8 was dealing." One has, therefore, the authority of the Court of Appeal on two points— first, that an option to purchase given to the lessee does not touch and concern the thing demised and, secondly, that the rule which treats as running with the land the benefit of a covenant for renewal is difficult to justify.

Returning to the covenant which I have to consider here, the primary obligation is the obligation of the lessor to pay 500*l.* on the expiration or sooner determination of the lease. If he does not wish to pay it and the lessee acquiesces, the

(1) [1905] 2 Ch. 257, 279.

UTHWATT J.
1941
HUNTER'S LEASE, *In re.*
GILES *v.* HUTCHINGS.

lessee may continue in possession and require a new lease, but that is merely an alternative and needs the concurrence of both parties to bring it into operation. Neither party can force on the other a renewed tenancy. To hold that the burden of the covenant here in question runs with the reversion would be to extend the operation of the rule stated by the Court of Appeal to be anomalous that a covenant to renew touches and concerns the thing demised. I hold, therefore, that the reversioner is not personally responsible for the payment of the 500*l.* Accordingly, I will declare that, on the true construction of the lease the lessee, without prejudice to his rights against the original lessor, is not entitled to recover that sum against the reversioner. I do not propose to make any order as to costs.

Solicitors: *Gibson & Weldon, for Tucker & Jenkins, Paignton; Walter Crimp & Co., for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

K. R. A. H.

In re GORDON.

PUBLIC TRUSTEE *v.* BLAND.

UTHWATT J.
1941
Dec. 4.

Will—Hotchpot—Power of appointment—Interests of children and remoter issue—Liability to hotchpot—Life and reversionary interests—Valuation.

By his will a testator directed his trustees to hold one-half of his residue on trust (subject to a life interest to his widow) for his two sons on protected life interests, and after their deaths in trust for their wives, children and remoter issue as they should by deed or will appoint. The will contained a proviso that at the period of division (i.e., the death of the testator's wife) the shares should be brought into hotchpot. One of the sons by his will, in exercise of the power of appointment conferred on him by his father's will, appointed a life interest to his wife and, subject thereto, directed that his share should be held in equal shares for his children and that the portion of each of his daughters should be held on trust to pay the income to them for life, and that the share of each daughter should be held after her death in trust for all or any of her children who being male should attain

UTHWATT J.

1941

GORDON, *In re.*

PUBLIC TRUSTEE *v.* BLAND.

the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares. In case the trusts should fail, he directed that the share of a daughter so failing should be held in trust for such person or persons as such daughter should by will appoint. At the period of division there were three infant children, issue of the marriage of one of the daughters of the testator's son. A summons was taken out by the trustee of the testator's will to determine (inter alia) the manner in which the provisions as to hotchpot were to be carried out:—

Held, that the operation of the hotchpot clause was confined to the life interests of the two daughters of the testator's son.

In re West [1921] 1 Ch. 533 considered.

By his will, dated May 4, 1903, Alexander Gordon (hereinafter called "the first testator"), after making certain specific bequests and devising and bequeathing all his real and personal estate on trust for sale and payment of his funeral and testamentary expenses and legacies, directed his trustees to stand possessed of his residuary trust funds in trust to set apart one half and to pay the income thereof to his wife, Mary Gordon, during her widowhood and after her death or re-marriage to stand possessed of the said one half on trust for his sons, Alexander Gordon and John Gordon, in equal shares, subject to the provisions thereinafter contained. After directing his trustees to stand possessed of the other half of his residuary estate on trust for his two daughters and directing that the share in his residuary estate which was to be held in trust for each child should not vest absolutely in each child, but should be held on certain protected life interests, he directed as follows: "and after the death of such respective child of "mine my trustees shall stand possessed of the same trust "fund and the interest and income thereof in trust for the "wife or husband (as the case may be) and children and "remoter issue of such child of mine . . . . in such manner as "my said child by any deed or deeds revocable or irrevocable "or by will or codicil shall . . . . appoint . . . . Provided "always that no child of such child of mine who or whose "issue shall take any part of such trust fund under any appoint"ment by virtue of the power hereinbefore contained shall "in default of appointment to the contrary be entitled to any "share of the unappointed part thereof without bringing the "share or shares or interest appointed to him or her or his or "her issue into hotchpot and accounting for the same "accordingly." The first testator died on January 4, 1909.

By his will, dated April 28, 1909, Alexander Gordon (hereinafter called "the second testator"), in exercise of the power contained in his father's will appointed that, after the death of the survivor of himself and Mary Gordon (the happening of which event was thereinafter referred to as "the period of "division"), the trustee or trustees of his father's will should stand possessed of his share in his father's estate on trust to pay the income to his wife, Isabella Gordon, during her widowhood and, subject thereto, should hold his share on trust to divide it or treat it as divided into four equal portions and to appropriate one of such portions to each of his four children and he directed that such appropriation should be made, in the case of each of his daughters, whether she should or should not be living at the period of division, and should not vest absolutely in them, but should be held on trust to pay the income of the portion of each of them who should survive the period of division "to such daughter for her separate use "during coverture . . . . and from and after the death of such "daughter or as regards either of my said daughters who may "have died before the period of division then from and after "the period of division I direct that my father's trustees shall "stand possessed of the portion of each of my said daughters "in my share of my father's estate in trust for all the children "or any the child of each of such daughters of mine who "being male attain the age of 21 years or being female attain "that age or marry if more than one in equal shares and I "direct that in case the trusts hereinbefore declared con-"cerning the portion of either of my said daughters shall fail "then and in such case subject and without prejudice to the "trusts hereinbefore declared concerning such portion so far "as the same shall take effect and to any powers vested in my "father's trustees in relation thereto and to every or any "exercise of such powers the same portion including any "further share or portion which may accrue or be added "thereto under this present clause or provision shall be held "by my father's trustees in trust for such person or persons "and for such purposes as such daughter shall by will or "codicil appoint and in default of and subject to any such "appointment shall accrue and be added to the original "portions hereinbefore directed to be appropriated to "my other children whether surviving the period of "division or not and the portion or portions which shall "so accrue to my said respective children shall be held "upon the like trusts as are herein declared concerning "their respective original portions so far as the same are "capable of taking effect." The second testator died on April 24, 1938.

The first testator's widow, Mary Gordon, died on June 28, 1938. The second testator had one son and three daughters. The son died in his lifetime, a bachelor and intestate, leaving him his sole next of kin. His three daughters were Isabella Gladys Bland, who was married in 1940 and had no children; Margaret Selby Lane, who was married in 1929, there being three children of the marriage; and Mona Winifred Holden Roberts, who was married and died without issue in 1930. The second testator's widow, Isabella Gordon, died on August 3, 1940.

The Public Trustee, as trustee of the will of the first testator, took out a summons to determine (inter alia) the following question, which arose under the hotchpot clause in the will: Whether the two daughters of the second testator were bound to bring into hotchpot (i.) the capital value as at the death of Isabella Gordon, or at any other and what time, of the one-fourth share which was by the will of the second testator directed to be appropriated to them respectively and settled on them and their children respectively but with a general power of appointment by will in default of them respectively having children taking a vested interest, or (ii.) the value, as at the death of the said Isabella Gordon, or at any other and what time, of (*a*) their respective life interests in the shares (and either with or without any accruer which might have occurred or might thereafter occur thereto), and

UTHWATT J.

1941

GORDON, *In re.* PUBLIC TRUSTEE *v.* BLAND.

(*b*) all such interest as their issue might thereafter take in the shares (and either with or without any accruer thereto which might have occurred or might thereafter occur), or (iii.) any other and what amount or interest, and, if so, how and at what date the same ought to be valued.

Ackroyd, for the plaintiff, the Public Trustee.

Blease, for the defendants, Isabella Gladys Bland and Margaret Selby Lane. These daughters of the second testator took vested and indefeasible life interests with remainder to such of their children as should attain twenty-one, and, if there were no such children, the daughters had a general power of appointment by will. The question is whether they must bring into hotchpot, not only the value of their life interests, but also the capital value of their shares on the footing that, either by virtue of the appointment or by virtue of the general power of appointment by will vested in them, they and their children are entitled to the whole of the capital of their respective shares. If there is something which cannot be actuarially valued, hotchpot must be ignored. The children might not attain twenty-one and the general power of appointment by will conferred on the daughters might not be exercised with the result that these interests might become vested in other parties. The interests of the children are contingent on their attaining twenty-one and there is nothing which can be valued or brought into account, except the two life interests of the daughters. Therefore, these two life interests, alone, can be brought into hotchpot. [He referred to *In re West* (1).]

Geddes, for the infant children of Margaret Selby Lane.

H. MacMaster, for the legal personal representative of Mona Winifred Holden Roberts. The whole share is covered by the life interest coupled with the power of appointment whether by deed or will: see *Slark* v. *Dakyns* (2). In *In re West* (1) there was a life interest coupled with a general power of appointment by will. Such a complete appointment of a share is sufficient to prevent any part of it from passing in

(1) [1921] 1 Ch. 533.

(2) (1874) L. R. 10 Ch. 35.

UTHWATT J.

1941

GORDON, *In re.* PUBLIC TRUSTEE *v.* BLAND.

default of appointment. [He referred to *Phipson* v. *Turner* (1).] Whatever benefit the mother and children receive comes into hotchpot. Therefore, anything which the mother applies for her children's benefit must be brought into hotchpot.

Benas, for the executor of the will of the second testator.

UTHWATT J. [after stating the facts:] The question which I have to decide is the extent of the property which is to be brought into account for the purposes of the hotchpot clause. There is no doubt that a power to appoint among a specified class is well exercised by giving a member of that class an interest with a power to appoint by will. That was decided in, among other cases, *Slark* v. *Dakyns* (2), which follows the decision in *Phipson* v. *Turner* (1), so that there can be no question here of the validity in all respects of the appointments which have been made in favour of the daughters and their children.

No one disputes that Isabel Gladys Bland and Margaret Selby Lane have to bring in their life interests. The question is whether anything more has to be brought in. It has been argued very vigorously that when one looks at the substance of what Isabel Gladys Bland and Margaret Selby Lane and their children took under the appointments in their favour, one reaches the position that for all commercial purposes they took the whole share and that one can safely disregard as negligible the possibility of a daughter not exercising the power in her will and any interest becoming vested in other parties by reason of the fact that no child of these two daughters might obtain a vested interest. As a commercial fact, I think that this possibility may be neglected, but that does not conclude the matter. The various interests appointed are not, when taken together, equal to, or commercially the same as, an absolute interest. One must take the interests separately, and consider whether under the hotchpot clause anything other than vested interests have to be brought into account.

On the question what has to be brought into hotchpot under a clause like this there is the authority of Astbury J., in *In re West* (1). There the donee of a limited power, who died in 1886, appointed a fund to T. for life and after her death on trust to her issue or children and in default of issue or children in trust as to one moiety to G. for life and after that on certain other trusts. In the deed creating the power there was a hotchpot clause which provided that no one of the children "who or whose issue shall take any part of the "said trust premises under any appointment in pursuance of "either of the powers lastly hereinbefore contained shall in "default of appointment to the contrary have or be entitled "to any share in or to any sum of money raisable out of the "unappointed part of the said trust premises under the said "trust in default of appointment without bringing the share "or shares appointed to him or her or to his or her issue into "hotchpot and accounting for the same accordingly." That clause is very much the same as the clause which I have to consider in this case. G. died in 1915 without any issue and T. died in 1920 without any issue, and the fund became distributable. The question arising what ought to be brought into hotchpot, Astbury J. decided that the life interest of T. must be brought into hotchpot, but that the life interest of G. need not be brought into hotchpot for two reasons, first, because G. took only a defeasible life interest and, therefore, it could not be said that she took any appointed part or share within the meaning of the hotchpot clause, and, secondly, because the matter arose after G. had died and it would be unfair at that stage to assess a retrospective actuarial value of G.'s life interest without regard to the actual fact that her defeasible life interest had never come into being. In the course of his judgment Astbury J. referred to the following remarks made by Sir George Jessel M.R. in *Eales* v. *Drake* (2): "It is quite clear that both life interests and reversionary "interests must be brought into hotchpot. The value of them "must be ascertained in the best way you can; and if you "cannot agree, there must be an inquiry." It would appear, however, that the point did not actually arise for decision

---

(1) (1838) 9 Sim. 227.

(2) L. R. 10 Ch. 35.

(1) [1921] 1 Ch. 533.
(2) (1875) 1 Ch. D. 217.

UTHWATT J.

1941

GORDON, *In re*

PUBLIC TRUSTEE *v.* BLAND.

in *Eales* v. *Drake* (1), and that Sir George Jessel's statement is a dictum, and, as Astbury J. said (2), it must on the facts be confined to an absolute and indefeasibly vested reversionary interest. Astbury J., after stating his view, quotes from Jarman on Wills, 6th ed., p. 1180, as follows (3): " When life and reversionary interests have "to be brought into hotchpot . . . . it is difficult to "say how they should be valued. In *Eales* v. *Drake* (1), "Sir George Jessel M.R. said that their value 'must be "'ascertained in the best way you can.' In *In re* "*Heathcote* (4), a case on a settlement, Kekewich J. held that "the value of certain life interests, which were to be brought "into hotchpot, must be calculated not by reference to the "duration of the interests, but by an actuarial valuation of "them at the time when they first took effect. In *Wheeler* "v. *Humphreys* (5) the House of Lords do not seem to have "considered the point, but their decision appears to involve "the view that actual, and not actuarial, values are to be "taken. With great diffidence it is submitted that the correct "method is that stated above in the case of annuities, namely, "that you consider the state of facts and contingencies at "the time when the life interest or reversion is to be brought "into hotchpot."

In the present case the point of time at which the matter has to be considered is August 3, 1940, when it became necessary to consider how the unappointed funds ought to be divided. Under the will the persons who are bound to bring assets into hotchpot are described as the children who or whose issue shall take any part of such trust fund under any appointment by virtue of the reversionary power. The clause provided that " no child of such child of mine who "or whose issue shall take any part of such trust fund under "any appointment by virtue of the power hereinbefore contained shall in default of appointment to the contrary be "entitled to any share of the unappointed part thereof without

---

(1) (1875) 1 Ch. D. 217.

(2) [1921] 1 Ch. 540.

(3) Ibid. 541.

(4) [1891] W. N. 10.

(5) [1898] A. C. 506.

UTHWATT J.

1941

GORDON, *In re.* PUBLIC TRUSTEE *v.* BLAND.

"bringing the share or shares or interest appointed to him or "her or his or her issue into hotchpot." A child—in this case a daughter—has certainly taken an interest in the fund. What that child has to bring in is "the share or shares or "interest appointed to him or her or his or her issue." I agree with the view expressed by Astbury J., and I do not think that it can really be said that the contingent interests of the daughter's children are shares or interests appointed to them when the matter in relation to which the point is to be considered is a division to be made at the present time.

The next point is what effect is to be given to the fact that the daughter, in default of issue who would take a vested interest, is given a general power of appointment by the will? That power of appointment arises only on failure of any children of the daughter to take a vested interest. Is the power of appointment, exercisable only by will and in those circumstances, in any real sense a share or interest appointed by the instrument of appointment for the purpose in relation to which it has to be considered? In my opinion, it is not. To say that the daughter has a share or interest capable of valuation by virtue of that contingent power is not, I think, an apt use of words.

I, accordingly, hold that the only interests which need be brought into account under this hotchpot clause are the two life interests appointed to the daughters, Isabella Gladys Bland and Margaret Selby Lane.

Solicitors: *Ayrton & Alderson Smith, Liverpool.*

J. L. D.

C. A.

1941

Nov. 3, 4;
Dec. 1.

In re HALL.

HOLLAND *v.* ATTORNEY-GENERAL AND ANOTHER.

Revenue—Estate duty—Settled estate—Death of settlor—Payment of duty by tenant for life—Statutory charge in her favour—Release of charge—Death of tenant for life—Liability of estate for duty on amount paid by tenant for life—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*), (*c*); *s.* 5, *sub-s.* 2 (*as amended by Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14 (*a*); *s.* 9, *sub-s.* 6; *s.* 22, *sub-s.* 2 (*a*).

A testator by his will settled property upon trust for his widow for life and after her death upon the trusts therein mentioned. On the testator's death the widow paid the estate duty on the settled property and many years before her death released the charge on the settled estate for the amount of the duty, conferred on her, as it was assumed, by s. 9, sub-s. 6, of the Finance Act, 1894:—

Held (affirming Morton J.), that on the death of the widow the whole unencumbered estate was exempt from estate duty by virtue of s. 5, sub-s. 2, of the Act of 1894, as amended by the Finance Act, 1914, s. 14. A proportionate part of the settled estate corresponding to the amount of the charge was not then subject to estate duty because (1.) the property passing on the widow's death was the same property as that which passed on the testator's death; (2.) the property passing on the widow's death was not to the extent of the amount secured by the charge released derived under a different title from that of the rest of the settled estate; (3.) having regard to s. 22, sub-s. 2 (*a*), of the Act of 1894, the widow had not, by obtaining a charge on the settled estate, become competent to dispose of that property so as to prevent the exemption conferred by s. 5, sub-s. 2, as amended, from applying; (4.) by paying the duty and releasing the charge the widow had not made a gift in which she had retained a benefit so as to cause the gift to be deemed to pass on her death under s. 2, sub-s. 1 (*c*), and so to become liable to estate duty.

APPEAL from Morton J.

The following statement of the facts is taken substantially from the judgment of Morton J.

Immediately before his death in 1909 Mr. Lewis Duval Hall, the husband of Mrs. Mary Kate Hall and father of Dame Mary Kate Duval Holland (hereinafter called "Lady "Holland"), was absolutely entitled to an estate consisting of freehold and leasehold property in London, known as the

Mornington estate. By his will dated August 1, 1907, Mr. Hall appointed Mrs. Hall, John Lees Casson and Lord Askwith, then Mr. George Ranken Askwith, executors and trustees thereof, and he devised the estate " unto and to the use of "my said wife and the said John Lees Casson and George "Ranken Askwith their heirs executors and administrators "according to the tenure thereof upon trust that my trustees "or trustee shall pay the net rents and annual income of the "said freehold and leasehold estates to my wife Mary Kate "Hall during her life and after the death of my said wife "shall stand possessed of the said freehold and leasehold "estates in trust for all or such one or more exclusively of "the others or other of my children or remoter issue for such "estates or estate interests or interest at such age or time "or respective ages or times and with such future or other "trusts for their respective benefit and such provisions for "their respective advancement either in the lifetime of my "said wife or after her death and such provisions for their "maintenance and education at the discretion of my trustees "or trustee or any other person or persons and in such manner "in all respects as my said wife shall by any deed or deeds "revocable or irrevocable or by will or codicil appoint . . . ." Certain trusts in default of appointment did not take effect in the events which happened. They did not include the usual trusts in default of appointment for Mr. Hall's children, but there were certain trusts of part of the estate in favour of Mr. Hall's daughter during her life, and of her issue after her death, and trusts of other parts of the estate in favour of Mr. Hall's son, Geoffrey Duval Hall, during his life and his issue after his death. Mr. Hall appointed his executors trustees for the purposes of the Settled Land Acts, gave certain powers of management to his trustees, and devised and bequeathed all his real estate not otherwise disposed of and all the residue of his personal estate to Mrs. Hall absolutely. By a codicil dated February 2, 1909, he revoked the appointment of Lord Askwith as executor.

Mr. Hall died on August 20, 1909, and probate of his will was granted on December 17, 1909, to Mrs. Hall and

Mr. Casson in the Principal Probate Registry. The Mornington estate was valued for probate at just over 43,000*l.*, and estate duty amounting to 7921*l.* 2*s.* 6*d.* was payable in respect of it. Mr. Hall's residuary estate was worth about 10,000*l.* Mrs. Hall wished to pay the estate duty on the Mornington estate out of her own moneys, and it was contemplated at one time that she should be given a mortgage on that estate to secure the sums to be so paid by her. A draft mortgage was submitted to her but she decided not to proceed further with it. Mrs. Hall subsequently paid the duty amounting to 7921*l.*, as to 6600*l.* on April 21, 1911, and as to the balance on June 21, 1911. The Crown's charge in respect of estate duty under s. 9, sub-s. 1, of the Finance Act, 1894, disappeared when she paid the duty, but one of the questions argued was whether or not Mrs. Hall got the statutory charge conferred by s. 9, sub-s. 6 (1).

It was suggested that the wishes and intentions of the person paying the money were material on this point, and affidavit evidence was filed that Mrs. Hall always regarded the Mornington estate and the investments representing the same as unencumbered, that her constant desire and object at all times was that the capital of the settled property and of the investments representing it should pass to her children and grandchildren entirely unencumbered, that she considered that that would have been the wish of her father-in-law, the late Vice-Chancellor Sir Charles Hall (whose memory and wishes she deeply venerated and under whose will her husband became entitled to the settled property), that she considered it her moral duty to safeguard his property in every way, and that she told Miss Holland she had paid the duties on the

(1) By Finance Act, 1894, s. 9, sub-s. 5: "A person authorized "as required to pay the estate "duty in respect of any property "shall, for the purpose of paying "the duty, or raising the amount of "the duty when already paid, have "power, whether the property is "or is not vested in him, to raise "the amount of such duty and any "interest and expenses properly "paid or incurred by him in "respect thereof, by the sale or "mortgage of or a terminable "charge on that property or any "part thereof."

By sub-s. 6: "A person having "a limited interest in any property, "who pays the estate duty in "respect of that property, shall be "entitled to the like charge, as if "the estate duty in respect of that "property had been raised by "means of a mortgage to him."

estate herself so that the capital value remained untouched. Lady Holland, in an affidavit sworn by her, referred to a letter which had recently been found among Mrs. Hall's papers, dated June 23, 1920, and addressed to John Lees Casson, one of the original trustees of the testator's will. The letter contained the following passage: "Mr. Griffiths [the solicitor "who was at that time advising Mrs. Hall] suggested that this "excess sum [after a part of the Mornington estate had been "sold] should be deducted from the purchase money, as also "the estate duty for Mornington Crescent alone, approximately "amounting to 7000*l.*, which I paid out of my own funds, as "I would not have a charge made on the property. I told "him I did not wish this done, that I prefer the whole of "the purchase money, minus the expenses of the sale, should "be handed over in full to the trustees."

Mr. Casson died on August 19, 1925, and by a deed of March 10, 1926, between Mrs. Hall and Lord Askwith, the latter was appointed to be a trustee of Mr. Hall's will in his place. By a vesting deed dated March 11, 1926, between Mrs. Hall and Lord Askwith of the one part and Mrs. Hall of the other part it was declared that so much of the settled property as then remained unsold including that which was later scheduled to a deed dated June 18, 1930, was vested in Mrs. Hall in fee simple on the trusts and subject to the powers and provisions on and subject to which the same ought to be held from time to time. By a deed of appointment and surrender dated July 19, 1928, and made between Mrs. Hall and Lord Askwith, which recited that parts of the Mornington estate had from time to time been sold and that part of the proceeds of sale was represented by investments scheduled to the deed, Mrs. Hall appointed the scheduled investments to be held, subject to her own life interest, in trust for Miss Holland absolutely, and she assigned and surrendered her life interest. The nominal value of the investments was just over 10,000*l.* By a like deed dated June 18, 1930, Mrs. Hall appointed part of the Mornington estate to be so held. By a deed dated January 20, 1934, Mrs. Hall conveyed to Miss Holland in fee simple the property comprised in the deed of

C. A.
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

June 18, 1930. On January 14, 1936, Mrs. Hall by one deed appointed more of the estate to Miss Holland and assigned and surrendered her life interest in the part so appointed, and by another conveyed that part to Miss Holland in fee simple. Thus, Miss Holland received the income of those parts of the estate in which Mrs. Hall had released her life interest. During Mrs. Hall's lifetime the whole of the estate save those parts comprised in the appointment of June 18, 1930, the conveyance of January 20, 1934, and the appointment and the conveyance of January 14, 1936, was sold. All the proceeds of sale were invested and the income, save that comprised in the appointment of July 19, 1928, was paid to Mrs. Hall for life.

By her will dated December 1, 1937, Mrs. Hall made Lady Holland her sole executrix and appointed the investments of the proceeds of sale of the Mornington estate to Lady Holland absolutely should she survive her and, should she not, absolutely to Miss Holland, to whom she gave her residue. Mrs. Hall died on October 14, 1938, whereupon the Mornington estate was exempt from further duty by virtue of s. 5, sub-s. 2, of the Finance Act, 1894. The Crown claimed, however, that estate duty was payable in respect of the 7921*l.* or of part of it, alleging that Mrs. Hall had by that amount increased the value of the Mornington estate by paying estate duty in 1911 in respect of Mr. Hall's death, and that she had thus either brought that amount into the settlement made by his will or had herself made a new settlement of it.

Accordingly, Lady Holland issued this summons, to which the Attorney-General and Miss Holland were respondents. The first and, for the purpose of this report, only material question raised was whether, on the death of Mrs. Hall, estate duty became payable in respect of the whole, or any part, of the 7921*l.* paid by her to defray the estate duty in 1911.

Morton J. held that, when Mrs. Hall paid the estate duty in 1911, she automatically obtained a charge on the estate for the amount of the duty under s. 9, sub-s. 6, of the Finance Act, 1894 (there being no evidence that she was aware of the provisions of that sub-section and had disclaimed the charge)

C. A.
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

but that, by her conduct in 1920, she released it; that, in so doing, she did not make a settlement of the sum released which thereafter was held on the trusts declared by Mr. Hall's will, or bring into the original settlement a sum equal to the amount of the duty so as to render that sum liable to estate duty under s. 2, sub-s. 1 (*a*), of the Finance Act, 1894; nor did she make a gift to the persons successively entitled to the estate of that sum, with the reservation to herself of the benefit of the release, so as to render duty payable under s. 2, sub-s. 1 (*c*), of the Act of 1894.

The Attorney-General appealed.

J. H. Stamp for the Attorney-General. On the death of Mr. Hall the Mornington estate became charged with estate duty in favour of the Crown under s. 9, sub-s. 1, of the Finance Act, 1894. That charge ceased on payment by Mrs. Hall of the duty, but a charge for the amount paid arose automatically in her favour under s. 9, sub-s. 6. Morton J. has found, and it is admitted by the revenue authorities, that Mrs. Hall released that charge more than three years before her death. Although on the death of a tenant for life, who is the spouse of the settlor, an estate which has paid duty on the death of the settlor is exempted from further duty by s. 5, sub-s. 2, of the Act, as amended by s. 14 of the Finance Act, 1914 (1), that does not apply to the difference in values of the encumbered and unencumbered estate because, but for the releasing of the charge, it is only the encumbered estate that would have passed on the death of Mrs. Hall. It is true that to the extent of the parts of the settled estate appointed by Mrs. Hall and released from her life interest more than three years

---

(1) By Finance Act, 1894, s. 5, sub-s. 2: "If estate duty has "already been paid in respect of "any settled property since the "date of the settlement, the estate "duty shall not . . . . be payable "in respect thereof, until the death "of a person who was at the time "of his death or had been at any "time during the continuance of "the settlement competent to "dispose of such property."

Finance Act, 1914, s. 14, abolished this exemption save "where ". . . . estate duty has been paid ". . . . upon the death of one of "the parties to a marriage, so far "as respects the payment of "estate duty on the death of the "other party to the marriage."

C. A.
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

before her death no duty is payable on her death, but an apportioned part of the value of the charge is included in that part of the settled estate which passed on her death and duty is payable on that apportioned part. This duty is payable on various grounds. First, the release of the charge was a gift by Mrs. Hall and, as she benefited as tenant for life by the release, she retained an interest in the gift, with the result that it was deemed to pass on her death under s. 2, sub-s. 1 (*c*), of the Act, and duty is payable. The release of a mortgage is a gift: *Attorney-General* v. *Worrall* (1). The equity of redemption which subsisted during the continuance of the charge cannot be called the same property as the unencumbered estate. Again, by releasing her charge, Mrs. Hall was really settling the amount of the charge on the trusts of the settled property, and to that extent, therefore, the unencumbered property was not the property on which duty had been paid on Mr. Hall's death. The only settled property was the Mornington estate subject to the charge, first in favour of the Crown and afterwards in favour of Mrs. Hall. If Mrs. Hall had accepted a mortgage of the estate and afterwards released it, there would have been a clear addition to the estate. That an equity of redemption differs from the unencumbered property is clear from *Earl Cowley* v. *Inland Revenue Commissioners* (2), and the similarity of the charge under s. 9, sub-s. 6, with a mortgage is recognized in *Lord Advocate* v. *Moray* (*Countess of*) (3).

Lastly, s. 22, sub-s. 2 (*c*), of the Act of 1894 provides that "money which a person has a general power to charge on "property shall be deemed to be property of which he has "power to dispose." Hence, it is an a fortiori case when the charge is actually in existence, and property of which a tenant for life has at any time had power to dispose is expressly excepted from the exemption conferred by s. 5, sub-s. 2.

Harman K.C. and *H. Rose* for Lady Holland. It was the Mornington estate that was settled by Mr. Hall's will, and it is that property which passed free of estate duty on the death of his wife under s. 5, sub-s. 2, of the Act, as the property had borne estate duty on the death of Mr. Hall. That duty was paid on the unencumbered fee simple, and, therefore, the whole estate, whatever its form might be at Mrs. Hall's death, passed free of estate duty. There is no justification for its division into an encumbered estate and the encumbrance so as to make duty payable on the amount of the encumbrance. The *Cowley* case (1) does not assist the Crown's contention. It is not as if on the settlor's death the estate less the estate duty alone bore the duty: see *In re Payne's Declaration* (2). It might well be that, if after Mr. Hall's death an investment forming part of the settled estate had been lost and the loss had been made good by Mrs. Hall, the accretion to the settled estate would be liable to duty on her death, but here there is no separate asset which she can be said to have settled on the trusts of the settled estate. An apportioned part of the estate will not suffice as the subject-matter of duty. The property that passed on Mrs. Hall's death is the same property that passed on Mr. Hall's death. It is not true to say that the settled property was an encumbered estate. The Crown is seeking to make the same property chargeable twice, contrary to s. 5, sub-s. 2. Again, the Attorney-General contends that the release of the charge was a gift within s. 2, sub-s. 1 (*c*), of the Act. To whom did Mrs. Hall make the gift? She was no better off after the release of the charge than she was before. It is only the remainder that is increased. It is not even as if a charge under s. 9, sub-s. 6, carried interest. How, then, can she be said to have retained any benefit? Sect. 2, sub-s. 1 (*c*), requires that the donor shall retain a benefit by contract or otherwise and it was laid down in *Attorney-General* v. *Seccombe* (3) that this meant that the benefit must be reserved by contract or by something of that nature. This contention of the Crown, therefore, fails because (1.) there was no benefit retained, and (2.) if there was, it was not retained by anything in the nature of a contract. [They referred to *In re Earl Howe's*

---

(1) [1895] 1 Q. B. 99.
(2) [1899] A. C. 198, 214.
(3) [1905] A. C. 531, 538.

---

(1) [1899] A. C. 198.
(2) [1939] Ch. 865.
(3) [1911] 2 K. B. 688, 701.

C. A.
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

Settled Estate (1) and *In re Anson* (2).] So far it has been assumed that Mrs. Hall automatically obtained a charge on the settled estate, but it is contended that this was not so because she showed a clear intention not to have a charge. Such an intention is sufficient to prevent the charge arising because it is an equitable charge: see s. 10, sub-s. 1, class C (ii.), of the Land Charges Act, 1925, and s. 2, sub-s. 3 (v.), of the Law of Property Act, 1925. In confirmation of this it will be noted that the charge was admittedly released without the execution of any deed. Anyone can renounce an equitable interest given to him for his own interest only: *Burrell* v. *Earl of Egremont* (3), and see Fisher and Lightwood on The Law of Mortgage, 7th ed., p. 669. By paying off the charge Mrs. Hall added nothing to the property which had borne duty on Mr. Hall's death, and, therefore, no duty became payable on her death: see *Attorney-General* v. *Worrall* (4). Again, there is no justification for the argument that, if Mrs. Hall had a charge, its release was a kind of notional settlement on the same trusts as the settled estate was held to be. Nor is it true to say that Mrs. Hall had property of which she was competent to dispose so as to make s. 5, sub-s. 2, inapplicable. The Attorney-General relied on s. 22, sub-s. 2 (*c*), which provides that when a person has a power to charge property he is deemed to be competent to dispose of it. Here, however, Mrs. Hall had at the most a charge and not a power to charge. It has been argued that the present is an a fortiori case, but nothing is taxable if a taxing Act does not apply to it in express terms.

Wilfrid Hunt, for Miss Holland, said that the same argument applied to the part of the settled estate released to Miss Holland less than three years before Mrs. Hall's death. As regards those parts released more than three years before the death, no claim was made to duty by the Crown.

Stamp, in reply, referred to *Attorney-General* v. *Lord Montagu* (5) and *Duke of Northumberland* v. *Attorney-General* (6).

Cur. adv. vult.

(1) [1903] 2 Ch. 69.
(2) [1915] 1 Ch. 52.
(3) (1843) 7 Beav. 205.
(4) [1895] 1 Q. B. 99.
(5) [1904] A. C. 316, 318.
(6) [1905] A. C. 406, 415.

1941. Dec. 1. The judgment of the court (LORD GREENE M.R., LUXMOORE and DU PARCQ L.JJ.) was read by LORD GREENE M.R. The facts relating to this appeal are fully set out in the judgment of Morton J. and we need not repeat them. There is, however, one matter of fact to which reference must be made. It was argued on behalf of the Crown that when the testator's widow, Mrs. Hall, paid the duty on the real estate which passed on his death, she obtained a charge on it under s. 9, sub-s. 6, of the Finance Act, 1894, but it was conceded that on this hypothesis she released the charge at latest in the year 1920. Morton J. accepted this argument. It is not necessary to express any opinion on this matter, since before us it was conceded on behalf of the Crown, and we agree that for the purposes of the first and principal argument for the Crown the position would for all relevant purposes be the same whether Mrs. Hall obtained a charge herself or merely by the payment extinguished the charge imposed in favour of the Crown by sub-s. 1 of s. 9 of the Act, while, on other arguments for the Crown, the result is, as will appear, the same whatever be the true view. Accordingly, we express no opinion on the questions whether a person with a limited interest paying the estate duty can refuse to accept the charge to which sub-s. 6 of s. 9 entitles him, and whether, if so, Mrs. Hall on the facts of this case ought to be regarded as having done so. We will deal with the first argument on the footing that the payment of the duty by Mrs. Hall extinguished the charge imposed in favour of the Crown by sub-s. 1 of s. 9 and that she obtained no charge herself under sub-s. 6 or otherwise.

The first argument presented on behalf of the Crown was to the following effect. The exemption granted by sub-s. 2 of s. 5 of the Act (as amended by s. 14 of the Finance Act, 1914) only applies where the settled property in respect of which exemption is claimed is the same property as that which bore duty on the death of the first to die of the parties to a marriage. It was said that in the present case this could not be asserted since the settled property when it came into existence as such had impressed on it a charge in favour of

C. A.
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

the Crown under sub-s. 1 of s. 9, and, accordingly, was, to the extent of the duty paid, not the same property as that which passed free from that charge on the death of Mrs. Hall. This argument is, in our opinion, based on a misconception. The property on which the charge in favour of the Crown was impressed was the unencumbered property, as the language of the sub-section clearly recognizes. It is, of course, fallacious to speak of moments of time elapsing between the death of the husband and the imposition of the charge. But the settled property has unquestionably for the purposes of the sub-section a separate existence since it is in respect of the unencumbered property and not in respect of the property as affected by the charge that the duty is imposed. The argument down to this point really involves treating the property in respect of which duty was paid on the death of the testator as the encumbered property which it clearly was not.

The argument was then put in a broader way. It was said that, even if the objections which we have summarized are valid, nevertheless the property as it passed on the death of Mrs. Hall was derived under a different title from that which existed at the death of her husband, and must be regarded as a composite property made up, to the extent of the amount of the duty paid by Mrs. Hall, of property which she had herself brought into the settlement. The result, it was said, is that to the extent stated the property must be regarded as different from that which bore duty on the death of the testator. This argument involves the proposition that where at a date actually (or, as in the present case, notionally) subsequent to the death of the first spouse a charge is imposed on the settled property—for example, by the widow as tenant for life in exercise of statutory powers—and that charge is before the death of the other spouse paid off and extinguished otherwise than by the expenditure of settled funds—for example, by the widow out of her own pocket—the property thus freed from the charge which passes unencumbered on the death of the second spouse is for the purposes of the sub-section different from that which passed on the death of the first spouse. In other words, the property which passes on the death of the second spouse is to be regarded as a composite property made up of two elements, namely, (1.) the residuum of the original property left after the amount of the charge has been deducted from it, and (2.), the amount so deducted which must be treated as restored to the settlement on the extinguishment of the charge or rather as the subject-matter of a fresh settlement by reference. The attractiveness of this argument, in our opinion, lies in its subtlety and not in its soundness, for we are unable to accept it. We can find no justification in the language of the sub-section for dissecting the property which passed on Mrs. Hall's death in this way. That property was the unencumbered estate, just as the property which passed on the death of her husband was the unencumbered estate. When once this fact is established the circumstance that in the interval a charge has both come into existence and gone out of existence appears to us to be irrelevant. We agree with the observation that the view presented on behalf of the Crown would never have occurred to anyone if the case had not been one of two spouses but had been, for example, one of father and son. It may well be that, if a part of the settled property had actually passed out of settlement, for example, on a sale by the widow as tenant for life and this had been bought back by her and brought into the settlement, different considerations would apply. But the present is not that case. We agree with the view taken by Morton J. on this branch of the argument.

Another point of construction on sub-s. 2 of s. 5 was raised by Mr. Stamp on behalf of the Crown. The exemption granted by the sub-section ceases to apply when a person dies who "had "been at any time during the continuance of the settlement "competent to dispose of such property." Upon this expression Mr. Stamp raised an argument based on the assumption that Mrs. Hall, when she paid the duty, obtained a charge under sub-s. 6 of s. 9 and for the purpose of considering it we will treat that assumption as correct. It was said that Mrs. Hall on obtaining the charge became "competent to "dispose" of the settled property for the purpose of enforcing the charge, and that, accordingly, duty became payable on her death to the extent of the amount of the charge. There is, in our opinion, a short answer to this argument to be found in the definition of persons deemed competent to dispose in s. 22, sub-s. 2 (*a*), which clearly does not include a person holding a charge of the present description.

It will have been noticed that for the purpose of discussing these arguments we have ignored the fact that Mrs. Hall in her lifetime made three appointments of parts of the settled property in favour of Miss Holland accompanied by surrenders of Mrs. Hall's life interest. Of these appointments and surrenders two took place more than three years before the death of Mrs. Hall. The property comprised in these two transactions, accordingly, is not to be deemed to have passed on the death of Mrs. Hall, and there was to that extent no need for Lady Holland to rely on the exemption granted by sub-s. 2 of s. 5. It was, accordingly, conceded by Mr. Stamp that, even if he was right in claiming that the exemption did not apply, duty would only be payable on a proportionate part of the amount of the duty which Mrs. Hall paid on the death of her husband.

We now turn to the last argument put forward on behalf of the Crown which is quite independent of sub-s. 2 of s. 5. It was based on s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, under which property passing on the death of the deceased is to be deemed to include " property taken under any gift, whenever "made, of which bona fide possession and enjoyment shall "not have been assumed by the donee immediately upon the "gift, and thenceforward retained to the entire exclusion of "the donor, or of any benefit to him by contract or other-"wise " : Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (as amended). It was said that by paying the duty Mrs. Hall made a gift, either to the persons interested in remainder or to the trustees for their benefit, it matters not which. This contention appears to us to be correct, but, as the gift was made more than three years before the death of the donor, Mrs. Hall, it must be shown that the gift was not retained by the donee "to the entire exclusion of the donor, or of any benefit to "(her) by contract or otherwise." To answer this question it

C. A.
1941

HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

is necessary to ascertain what was the subject-matter of the gift. It was argued by Mr. Stamp, on behalf of the Crown, that the gift was a gift of the 7921*l.* On this basis, and assuming that Mrs. Hall did not herself obtain a charge, Mr. Stamp contended that there was a "benefit" to Mrs. Hall "by contract or *otherwise*" in that she was thereby relieved of the obligation under which she lay as tenant for life to keep down the interest on the charge in favour of the Crown. Morton J. took the view that the remaindermen took an immediate benefit since a burden was removed from the inheritance, a benefit which thereafter they retained to the entire exclusion of the donor or any benefit to her by contract or otherwise. We agree with this conclusion although we are not sure that it does not imply a view as to the subject-matter of the gift inconsistent with the assumption on which it was based, that Mrs. Hall made a gift of the 7921*l.* The better view, in our judgment, is that the payment of the 7921*l.* accomplished a dual purpose, namely, it extinguished the liability of Mrs. Hall as between herself and those interested in remainder to keep down the interest and it extinguished a charge on the inheritance. It was the extinguishment of that charge by means of a money payment that was the subject-matter of the gift, not the money payment itself. The fact that the money payment operated also to relieve Mrs. Hall of a liability did not derogate from the completeness of that gift. It was not a reservation from the subject-matter of the gift, nor was it a benefit conditioning the gift. As regards Mrs. Hall, it was merely the extinguishment of her liability. The argument on behalf of the Crown, if accepted, would lead to the result that no person who was under a liability for interest could discharge the principal debt without being held to have obtained a benefit within the meaning of the statute. Thus, if a remainderman mortgaged his interest in remainder and the tenant for life joined in the mortgage in order to guarantee payment of the interest during his life and if thereafter the tenant for life paid off the mortgage, it would follow, on the argument for the Crown, that the gift which he thus made to the remainderman was one possession and

C. A
1941
HALL, *In re.*
HOLLAND
v.
ATTORNEY-GENERAL.

enjoyment of which was not "assumed to the entire exclusion "of the donor or of any benefit to him by contract or other-"wise" in that the effect of the payment was to free the tenant for life of a liability which would have lasted during the rest of his life. In truth, the payment in such a case would operate uno flatu to extinguish two liabilities and the whole transaction would have come to an end. Morton J. dealt with this question on the basis that Mrs. Hall obtained a charge which she subsequently released. On that basis, the position immediately before the release was that Mrs. Hall was entitled to the rents and was also the holder of a charge the interest on which, if it had been vested in a third party, she would have been bound to keep down. In these circumstances we are unable to see what benefit she could be said to have had from the release. Her position before and after the release was precisely the same. That part of the income which she was bound before to pay to herself as chargee she became entitled after the release to keep as tenant for life. Morton J. took this view and we agree with him.

The appeal is dismissed, with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Kingsford, Dorman & Co., for Shepheards & Bingley, Kensington.*

H. C. G.

Referred to. In re HATCH.
[1948] Ch. 592

Distinguished. Re HATCH *(decd.).*
[1948] 2 All E.R. 288.

VANDYKE *v.* ADAMS.

FARWELL J.

1942
Jan. 13, 21.

Practice — Writ — Service — Dispensation — " Enemy " — " Resident in " enemy territory "—Prisoner of war—R. S. C., Or. IX., *r.* 14B, *sub-r.* 1.

A member of His Majesty's forces who is held prisoner by a Power with whom His Majesty is at war, although " resident in " enemy territory," is not an " enemy " within the meaning of s. 2, sub-s. 1 (*b*), of the Trading with the Enemy Act, 1939, and, therefore, where such a person is defendant to an action, the court or a judge cannot, under R. S. C., Or. IX., r. 14B, sub-r. 1, dispense with service on him of the writ or a notice of it.

PROCEDURE SUMMONS.

Under a lease dated April 2, 1927, and made between the lessor, Mrs. Barbara Elizabeth Florence Addenbrooke, and the plaintiff, Frederick Salaman Vandyke, the plaintiff became tenant of 2 Addison Crescent, Kensington, for twenty-one years from March 25, 1927, subject to a yearly rent of 300*l.* and to performance of the covenants and conditions therein contained. Shortly before July 29, 1938, the plaintiff assigned the lease to the defendant, Donovan Guy Adams, for the rest of the term, and, in consideration of the defendant's accepting the assignment, agreed to pay him 550*l.* and to invest in the joint names of the defendant and himself as security for the performance of the covenants and conditions 300*l.* to be paid to the defendant or his personal representative should he duly have performed the covenants. The defendant covenanted to pay rent and to keep the plaintiff indemnified against the covenants in the lease. The plaintiff invested 300*l.* in a building society approved by the defendant, and, at the date of this summons, the money stood in their joint names. The defendant paid neither the rent due on December 25, 1939, nor any rent due after that date. The lessor claimed payment of the rent in arrear from the plaintiff who paid 517*l.* 17*s.* 4*d.* in respect thereof. The defendant, an officer in the army, was taken prisoner by the Germans, and at the date of this summons was detained by them either in Germany or in German-occupied territory. On October 15, 1941, the plaintiff issued a writ claiming a declaration that the defendant was liable to indemnify him against all sums paid by him under the covenants in the lease; payment by the defendant of the 517*l.* 17*s.* 4*d.* paid by the plaintiff under the covenants, and all other sums so paid by him; a declaration that the plaintiff was entitled to have the 300*l.* released to him; and an order on the defendant to direct the building society so to release it. Personal service on the defendant being impossible, the plaintiff applied by this summons for (i.) leave to issue a concurrent writ for service out of the jurisdiction and to make substituted service of a notice of the writ by service of the notice in London on a firm of solicitors who had acted for the defendant, or (ii.) an order, under R. S. C., Or. IX., r. 14B, sub-r. 1, dispensing with service of notice on the defendant (1).

Winterbotham for the plaintiff. Leave to effect substituted service should be granted. Alternatively, the court is asked to dispense with service of the writ or a notice of it on the defendant, under Or. IX., r. 14B, sub-r. 1, since the defendant, being "resident in enemy territory," is an "enemy" for the purposes of the Trading with the Enemy Act, 1939: see s. 2, sub-s. 1 (*b*), of the Act. [He referred to *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ld.* (2), where Lord Parker of Waddington stated that a company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.]

Cur. adv. vult.

1942. Jan. 21. FARWELL J. delivered a judgment in which, on the first point, he referred to *Porter* v. *Freudenberg* (3) and

---

(1) By R. S. C., Or. IX., r. 14B, sub-r. 1: "Subject to the provisions of this rule, the court or "a judge may dispense with "service of a writ of summons "or a notice of a writ of summons "on any defendant who is an "enemy within the meaning of "the Trading with the Enemy "Act, 1939, as amended by or "under any enactment."

By Trading with the Enemy Act, 1939, s. 2, sub-s. 1: "Subject to "the provisions of this section, the "expression 'enemy' for the purposes of this Act means—.... "(*b*) any individual resident in "enemy territory, ..."

(2) [1916] 2 A. C. 307, 344, 346.

(3) [1915] 1 K. B. 857.

In re Churchill & Co., Ld. & Lomberg (1), and said that the evidence had failed to satisfy him that the method of substituted service asked for was one which would in all reasonable probability, if not certainly, be effective to bring knowledge of the writ, or the notice of the writ, to the defendant, and, therefore, that he could not give the plaintiff leave to effect substituted service of the writ, and continued: The plaintiff, however, also seeks to avail himself of Or. IX., r. 14B, sub-r. 1, which enables the court or a judge to dispense with service in certain circumstances. On this, the question arises whether the defendant is an "enemy" within the meaning of the Trading with the Enemy Act, 1939. At first sight, it sounds fantastic to suggest that a soldier in His Majesty's army who has been taken prisoner and is detained in Germany or German-occupied territory is an enemy, but it is argued that the defendant is resident in enemy territory, although against his will, and that the terms of s. 2, sub-s. 1, of the Trading with the Enemy Act, 1939, which defines "enemy," are so wide that he comes within it, and so r. 14B, sub-r. 1, applies and service of the writ on him should be dispensed with. No doubt, it is true in one sense that the defendant is resident in enemy territory, but he is so resident only under force majeure. If the language of the definition in the Act alone fell to be considered, it might be thought wide enough to include a soldier who is detained as a prisoner of war in enemy territory, but when the whole scope of the Act and the purposes for which it was passed are regarded it appears plain that such a person does not fall within the definition and is not to be deemed to be an "enemy," for the purposes of the Act. In my judgment, a soldier in His Majesty's army who has been taken prisoner during war and is detained in enemy territory, is not an enemy in any sense of the word. Therefore, I am not prepared to make an order to dispense with service, and I dismiss the summons.

Solicitors: *Coode, Kingdon, Cotton & Ward.*

(1) [1941] W. N. 195.

K. R. A. H.

C. A.

UTHWATT J.

1941

Oct. 30.

C. A.

Dec. 12.

SMART BROTHERS, LIMITED *v.* ROSS.

Emergency legislation—Hire-purchase contract—Payments in arrear—Agreement between parties to determine contract—Owners to retake goods and refund part of money paid by hirer—Bargain freely entered into—Necessity to obtain leave of court—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.)—*Liabilities (War-Time Adjustment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *s.* 26, *sub-s.* 2.

By a contract of hire-purchase of furniture entered into in September, 1938, it was provided that the hirer might terminate the hiring by returning the goods at her own cost, and that in case of any breach of any term of the contract the owners might retake the goods. In 1941 the hirer informed the owners that she was unable to keep up payment of the instalments, and asked them whether, if they resumed possession of the furniture, they would make her an allowance of money. In June, 1941, the parties agreed that the owners should retake the furniture, and should return to the hirer 10*l.* out of the sum which she had already paid and release her from arrears of hire. A summons was taken out by the owners to which the hirer was a respondent asking whether this agreement to determine the hire-purchase contract could be carried out without first obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (ii.) :—

Held (Lord Greene M.R. dissentiente), that the owners were bound, under s. 1, sub-s. 2 (*a*) (ii.), to obtain the leave of the appropriate court to exercise their remedy by taking possession of the furniture, whether that remedy was regarded as arising under the hire-purchase agreement of September, 1938 (per MacKinnon L.J.), or under the agreement of June, 1941 (per Clauson L.J.).

Decision of Uthwatt J. reversed.

SUMMONS.

By an agreement dated September 3, 1938, Smart Brothers, Ld., who were referred to as "the owners," let out certain furniture to Miss Ross, "the hirer," under a hire-purchase agreement which provided by cl. 1 for an immediate payment of 2*l.* 4*s.* as a consideration for the option to purchase subsequently granted by the agreement and also for the payment of monthly instalments of 1*l.* 5*s.* in respect of the hire of the goods. Clause 2 contained a statement of the conditions on which the hirer would become entitled as owner to the furniture, but until those conditions were fulfilled the goods were to remain the sole property of the owners. By cl. 6: "The hirer "may terminate the hiring by returning the goods to the owners "at the hirer's own cost subject to cl. 9, the hirer remaining "liable for arrears of instalments (apportioned if necessary) "up to the date of such return and damages for breach hereof "(if any)." By cl. 8: "In case of any breach of any term "hereof the owners may—(*a*) without prejudice to their claim "for arrears of instalments or damages for breach of this "agreement forthwith without notice terminate the hiring and "repossess themselves of and remove the goods (for which "purpose their servants or agents may enter any premises the "hirer may occupy); (*b*) alternatively, by written notice (by "post or otherwise) to or left at the hirer's last known address "forthwith and for all purposes absolutely determine and end "this agreement and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the goods "with the owners' consent . . . ." Clause 9 provided: "If "the hirer exercises his or her rights under cl. 6, or if the "owners have to take possession under cl. 8 (*a*), the hirer shall "become liable to the owners for any sum necessary to make "the amount paid under cl. 1 equal to 33⅓ per cent. of the total "amount set out in the schedule" (which in fact was the sum of 52*l*. 3*s*. 6d.) "in respect of compensation and depreciation." The furniture was duly delivered to Miss Ross. From time to time it was taken by her with the owners' consent to various premises and latterly it was held by her at Croydon. She then became in arrear with her payments under the hire-purchase agreement, and the owners became entitled to retake possession of the goods under cl. 8. They did not do so, but granted her indulgence with regard to payment of instalments. In 1941 Miss Ross was ill and out of work and she went away to the country. On or about January 10, 1941, an oral arrangement was made under which the owners took the furniture into storage free of charge and for the account of Miss Ross, Miss Ross, for her part, agreeing to pay, and the owners agreeing to accept in respect of current rent and arrears, sums at the rate of 1*l*. a month beginning in February, 1941. The furniture was stored for Miss Ross by the owners at their warehouse, and Miss Ross paid 1*l.* on February 7, 1941. She made no further payments, however, and on March 14, the owners wrote to her asking her to send a further remittance and to advise them what arrangements she could make "regarding adjustment of the arrears." Miss Ross replied: "I sent my furniture back to you to store in January last. "My account number was R.947. I regret that I have not "been able to pay any more on this and you will see by the "above address that I am no longer in London. I was ill "and had to go away. I paid for my furniture regularly "when I had it . . . . As I am not able to pay more and you "have all the stuff back, is it possible for me to have a small "allowance back? I do not expect much, but I am ill and "out of work, and a little money would help me." In reply, the owners wrote on June 3: "We shall be very pleased to "do this, but before doing so, having regard to the legal "position which would require us, if we desired to exercise "our right to recover possession, to apply to the court against "you for leave to do so, we make it a rule to set out clearly the "terms upon which the goods are being collected, and to ask "our customers to sign a formal confirmation of those terms "before we actually collect them. If you wish us to do so, "we shall be pleased to collect the following goods" [the goods were specified] "and to release you from arrears of hire "accordingly to date, and to refund you the sum of 10*l.* in "respect of the amount you have paid." They asked for a reply and sent a form for Miss Ross to sign. Miss Ross returned the form when she had signed it and wrote: "I have signed "the enclosed form and would be pleased to receive from you "the sum of 10*l.*" The form which was signed by her was as follows: "I have received your letter of the 3rd inst., and "I confirm that it is my desire to determine my hire-purchase "agreement dated September 3, 1938, with you, which I "hereby do, pursuant to my right to do so under the Hire-"Purchase Act, 1938. It is clearly understood between us "that, upon my returning the goods as agreed to you, I shall "be under no further liability to you for arrears of hire, and "that you will return to me 10*l.* being part of the sum I have "paid on account of instalments under the agreement. Yours "faithfully [Signed] Sadie Ross."

The present summons was taken out by the owners against Miss Ross, and it asked whether, without obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939, the owners were at liberty, on the faith of the agreement which had been made between them and Miss Ross, to resume possession of the furniture.

A. A. Pereira for the owners. The owners wish to have a decision on the question whether it is possible for an owner who has let out goods on hire-purchase to come to a valid agreement with the hirer to enable the owner to resume possession of the property without necessitating an application to the court for leave under the Courts (Emergency Powers) Acts. In the present case, it is submitted, the owners were entitled to repossess themselves of the goods, the subject of the contract, without applying to the court for leave. Under the contract, Miss Ross being unable to keep up her instalments, the owners became entitled to retake possession, but they did not exercise their right. At Miss Ross's request they entered into an agreement with her to determine the hire-purchase agreement, and they resumed possession of the goods under that second agreement. The decision of Farwell J. in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1) has no application to this case, and that of the Court of Appeal in *Bowmaker, Ld.* v. *Tabor* (2) is clearly distinguishable. In the latter case the owners induced the hirer to allow them to retake the goods and the hirer received no monetary consideration for doing so. There the initiative came from the owners. Here it came entirely from the hirer, who wished to be released from her contract. In *Bowmaker, Ld.* v. *Tabor* (2), also, the owners presented a typewritten form for the signature of the hirer who signed it, and Goddard L.J. in his judgment expressed the view that the document was drafted expressly to try to avoid the necessity of applying to the court, but nothing of the kind occurred in the present case. Here the

(1) [1940] Ch. 638.

(2) [1941] 2 K. B. 1.

return of the goods was, as in the case put by Goddard L.J. at the end of his judgment, a bona fide exercise of the option given by cl. 6 of the hire-purchase agreement and was not a submission by the hirer to the owners' exercising his right to seize.

Longland for Miss Ross. The last step in these cases is the taking possession of the goods by the owners and they must always obtain the leave of the appropriate court before taking that step: *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1); *Bowmaker, Ld.* v. *Tabor* (2).

UTHWATT J. [after stating the facts:] It appears that the first move to get rid of the hire-purchase agreement and its consequences came from Miss Ross. It further appears that the owners had not been pressing for the return of the goods and had made no threat to exercise the power to retake possession contained in the hire-purchase agreement. The transaction of June, 1941, was designed to carry out, on terms which the owners were willing to concede, Miss Ross's desire to get rid of the hire-purchase agreement. She was free, apart from the provisions of the Courts (Emergency Powers) Act, 1939, to make an effective bargain, and there is no doubt that she desired to do so.

I do not propose to read the judgments in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1) and *Bowmaker, Ld.* v. *Tabor* (2). The effect of them is that no consent by the hirer and no contract entered into by him can avoid the necessity of obtaining the leave of the court before the owners exercise their remedy of taking possession. They do not go further than that. It appears to me that where, neither in form nor in substance, is the new transaction directed to avoiding the necessity of complying with the Courts (Emergency Powers) Act, 1939, but where it is in substance a bargain made by the hirer in virtue of his interest in the goods and is directed to satisfaction of that interest, there is no consideration of public policy arising in connection with the Courts (Emergency Powers) Act, 1939, which requires that full effect should not be given to the bargain so made. No remedy is being exercised by the owners.

---

(1) [1940] Ch. 638.

(2) [1941] 2 K. B. 1.

I am, accordingly, of opinion, and will so declare, that the owners were entitled, on the true construction of the Act and having regard to the nature of the agreement made by them with Miss Ross and the circumstances in which it was made, to act on that agreement and to retake possession of the furniture without obtaining any leave of the court.

The hirer appealed.

H. L. L.

Longland for the hirer.

A. A. Pereira for the owners.

The arguments were substantially the same as in the court below.

LORD GREENE M.R. This appeal raises a question of great importance to all parties to hire-purchase agreements. It is raised by means of a friendly originating summons taken out for the purpose of ascertaining the true construction of certain words in the Courts (Emergency Powers) Act, 1939, in their application to the facts of the case. The parties are represented by the same solicitors, but the matter has been fully argued by counsel on both sides and quite clearly this friendly litigation is not in any sense being conducted in a half-hearted way: it is a perfectly bona fide attempt, by proper means, and supported by the vigorous argument of counsel, to ascertain what the true legal position is.

It is clear in the present case that the arrangement between the parties which was ultimately come to was a perfectly bona fide one. The owners had not threatened to exercise their right to seize the furniture, and, so far as the evidence goes, they had neither the intention nor the wish to do so. Miss Ross, on the other hand, was anxious to put an end to the whole transaction for reasons which are abundantly clear on the face of the correspondence, and it was from her that the suggestion came that the owners should take back the goods and make her a payment. In those circumstances the

C. A.
1941
SMART BROS., LD. v. ROSS.
Lord Greene M.R.

owners prepared and sent to her a document, which she signed, in the following terms: "Dear Sirs, I have received your "letter of the 3rd inst., and I confirm that it is my desire to "determine my hire-purchase agreement, dated September 3, "1938, with you, which I hereby do, pursuant to my right to "do so under the Hire-Purchase Act, 1938. It is clearly "understood between us that, upon my returning the goods "as agreed to you, I shall be under no further liability to you "for arrears of hire, and that you will return to me 10*l.* being "part of the sum I have paid on account of instalments under "the agreement." There is one matter on that letter which calls for comment. It was drafted, obviously, with the idea that the hire-purchase contract in question was one to which the Hire-Purchase Act, 1938, applied. That was a mistake, and, therefore, looking at this document literally, Miss Ross is purporting by it to exercise a statutory right which she did not possess. No point, however, has been made on that, and the document has been treated by counsel on both sides as being a contract under which, in consideration of the release of liability for arrears and the payment of 10*l.*, she gave up her interest in the goods to the owners. I, therefore, ignore that error in the document and treat it as a contract to the effect which I have mentioned.

That being the transaction between the parties, the owners were anxious to know whether they could safely proceed according to its terms and keep the furniture as their own without first obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939. They were at the time in possession as bailees, but, if they acted on the agreement contained in the letter, they would be changing the character of their possession in that they would thenceforward possess, not as bailees, but as owners. The relevant words of the Act are contained in sub-s. 2, of s. 1, and they are as follows: "Subject to the provisions of this section, a person shall not "be entitled, except with the leave of the appropriate court "(*a*) to proceed to exercise any remedy which is available "to him by way of . . . . (ii.) the taking of possession of "any property." It is now asked whether, if and when the owners take possession of this furniture, in the sense of changing the character of their possession in the way I have mentioned, they will be proceeding to exercise a remedy available to them by way of the taking possession of the furniture. Uthwatt J. answered that question in the negative, and I find myself in complete agreement with the conclusion at which he arrived and with the reasoning by which he arrived at it.

The crucial word which requires construction here is the word " remedy." It is clear that if the owners had retaken possession of this furniture pursuant to the right to do so contained in the hire-purchase agreement, which, in my opinion, they clearly did not, that would have been the exercise of a " remedy " available to them, being the means by which they were entitled to remedy the breach of agreement which had led to their taking possession. It is also, to my mind, clear, and is stated in *Bowmaker, Ld.* v. *Tabor* (1)—and I agree, if I may say so, with the observations to that effect contained in that case—that, if Miss Ross had exercised the right which the hire-purchase agreement conferred on her to terminate the contract and return the goods, the owners could have accepted the goods without any need to apply to the court for leave to do so. The reason is that in such a case, in accepting the goods, or, indeed, in taking possession of them, if at the time when she exercised her right to return them they had been, let me say, in the hands of a third party, the owners would not have been exercising any remedy available to them by way of the taking possession of any property. To explain a little more clearly what I mean, supposing the goods at the time had been in the hands of a warehouseman and Miss Ross had been minded to exercise her right under the contract to terminate the hiring and had said to the owners : " I exercise my right, and the goods are "there. Will you take them ? " and they had agreed to fetch them, they would have agreed to take possession. But that, to my mind, would not have been the exercise of a remedy available to them under the hire-purchase contract. It would have been the taking possession of the goods in consequence of the exercise of a right by Miss Ross. Their title to take possession would have been derived from the exercise by her of her right and would not have arisen from any remedy to which they were entitled within the meaning of the subsection.

---

(1) [1941] 2 K. B. 1.

Thirdly, it is, to my mind, also clear that if, on the facts of any case, it appears that the owners of the goods are really exercising a right conferred on them by the hire-purchase contract to retake goods on breach of the agreement by the hirer, the Act applies even though the transaction has been given some colourable appearance of a different character. Whether or not a transaction falls within that description is, in my judgment, a matter of fact to be decided in each case. In whatever form of words the matter is wrapped up, whatever colourable contractual documents may have been signed, if the court comes to the conclusion that what is being done is the exercising of a right to seize on breach by the hirer, the Act will apply. But it is said that, no matter how genuine and bona fide a transaction may be by virtue of which the title of the owners to get possession of the goods arises under a separate contract altogether, they must be treated as exercising the right to seize contained in the hire-purchase agreement, and so the leave of the court is required. In my opinion, on the facts of the present case, when the owners take possession of these goods they will not be exercising a remedy under the hire-purchase agreement. They will be taking possession of goods of which they have obtained a right to take possession, not by virtue of anything in the hire-purchase agreement, but under a different and perfectly bona fide contract, a right for all relevant purposes similar in character to the right to take possession which any purchaser of goods gets when he contracts to buy them and the property vests in him.

It is then said, alternatively, that the owners would be exercising a remedy given to them by the agreement contained in the letter written by Miss Ross. If this argument is a sound one it merely means that the word " remedy " includes any right to take possession. When the matters with which the sub-section specifically deals are examined, it appears that they all have one character. They are all what I may call remedies for default of some kind. The levying of distress is a remedy for default in payment of rent. The appointment of a receiver of property is a remedy for default in payment of interest or something of that kind. Re-entry on land is a remedy for default or breach of covenant. The realization of any security or forfeiture of any deposit is a remedy for default in paying the debt in respect of which the security was given or discharging the obligation in respect of which the deposit was made.

That being the type of transaction in respect of which the word " remedy " is used, I ask myself whether it is possible to extend the construction of that word so as to cover a case of a totally different character, that is to say, a case where the right to take goods arises, not because a contract has been broken and to remedy the breach, but because the contract between the parties is nothing more than that the ownership (if it be ownership) which includes the right to possession or the right to possession alone is to pass to the other party. It seems to me that, if the construction suggested by counsel were adopted, every lessee who took a lease which gave him the right to go into possession of a house must be said to be exercising a " remedy " available to him by way of taking possession of the property. I venture to think that the word " remedy " in such a context as this is quite unsuitable to meet that class of case.

It was admitted by Mr. Longland that he could not press a construction which would have results of that kind, and he, therefore, limited the word " remedy " to cases where taking possession follows a default. In every case, he said, where there is a clause in a contract under which on default one party is entitled to take possession of property and that party does take possession, albeit under a new agreement with the other party to the contract, that taking of possession must be referred to the enforcement of the clause. In my opinion, that is untenable. The fact that the arrangement for taking possession follows a default in respect of which rights could be enforced seems to me to have no bearing on the matter save in so far as it is relevant to the question of fact whether or not the taking of possession which is effected is in execution of the default clause. If it is, the Act applies. If it is not, the Act does not apply, and the mere fact of the taking of possession following the default in time appears to me to throw no light on the character of the second transaction and to be incapable of turning that second transaction and the right which it confers into something different from that which in truth it is.

One further argument was suggested, and I can mention it without any appearance of discourtesy to MacKinnon L.J., who suggested it to Mr. Longland, Mr. Longland, I understood, accepting it as his own. The suggestion was that where there was a bona fide contract, as in the present case, the court would have no difficulty in granting leave, and that was put, as I understand it, as an argument in favour of construing " remedy " in the wide sense suggested. With the greatest possible respect, I cannot accept that argument. It seems to me that you cannot determine whether the leave of the court is required in a certain case by saying that in that case leave would be given and, therefore, on the true construction of the Act, leave is required. What we have to decide is what the Act means, and whether or not the case under consideration falls within its terms.

There are two authorities which were referred to in the judgment of Uthwatt J., and I must confess that they cause me no difficulty, any more than they did Uthwatt J. The first was the decision of Farwell J. in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1). There a mortgagee had, under the mortgage, the right to appoint a receiver, a remedy which he was precluded by the sub-section from exercising without the leave of the court. He asked the mortgagor to agree to his appointing a receiver. The mortgagor acquiesced, and the receiver was appointed. By appointing the receiver the mortgagee was exercising the remedy mentioned in the

(1) [1940] Ch. 638.

sub-section. He was not exercising something else. It was a remedy provided by the mortgage, and his only ground for saying that the leave of the court was not required was the fact that consent had been given by the mortgagor. The sole question was whether the mortgagor could consent to the exercise of the remedy so as to make it unnecessary for the mortgagee to come to the court. That question was answered in the negative because the protection which the sub-section gives cannot be waived in that way.

Bowmaker, Ld. v. *Tabor* (1), was a hire-purchase case. As in most hire-purchase agreements—it is so in the present case—the agreement contained two clauses relating to the determination of the contract. The subject-matter was a motor car, and the hirer was entitled to determine the agreement by returning the vehicle in good condition and repair together with the registration book, licence and insurance certificate. There was also a right given to the owners to seize the car if the hirer was in arrear with his payments. The hirer being in arrears, a representative of the owners suggested that he had better return the car, and he produced a typewritten form in the following terms: "I hereby declare that it is my desire "voluntarily to terminate the hiring under the above hire-"purchase agreement, and to surrender the vehicle concerned". The hirer signed it and the owners retook possession of the car. They subsequently sued the hirer for arrears, but he counter-claimed for damages on the ground that they had retaken the car without obtaining the leave of the court. It is obvious that the first question which the court had to decide was whether the retaking of possession of the car was in pursuance of the exercise by the hirer of his right to determine the contract, or whether it was in exercise of the right conferred by the contract on the owners to seize the car. Scott and Goddard L.JJ., in a joint judgment, answered that question clearly by saying that it was a seizure by the owners under the power to seize given to them in the agreement and was not a determination of the contract by the hirer under his option. The judgment makes it clear that, had it been the

---

(1) [1941] 2 K. B. 1.

C. A.

1941

SMART BROS., LD. v. ROSS.

Lord Greene M.R.

latter, the case would have fallen outside the sub-section. Having answered that question of fact in that way, the court had to consider the case on the footing that all that had happened was that the hirer had consented to the exercise by the owner of the owner's right to seizure under the hire-purchase agreement, and the only matter that fell for consideration was whether or not the view which Farwell J. had taken in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1), that the protection afforded in cases to which the Act applies cannot be waived, was correct. The Court of Appeal took the view that it was correct, and that where the Act applied it was not possible to get out of it, either by merely waiving the need to obtain the leave of the court or by agreeing for consideration that the leave of the court should be unnecessary. I call attention to the difference between those two things—"waiving," which implies waiver without consideration, and "contracting out of the Act," which means contracting that in a case to which ex hypothesi the Act applies the person who wishes to take possession shall be entitled to proceed without obtaining the leave of the court. That being an agreement would, of course, have to be for consideration. This explains the references in that judgment to contracting out of the Act.

There are one or two passages which I would like to read to show that the view which I take of that judgment is correct. Goddard L.J. at its outset refers to the first point taken by the owners, namely, that the goods were returned under an exercise by the hirer of his right to terminate the contract. That was negatived, and then the learned Lord Justice says (2): "It may be true that in one sense the car was given up "voluntarily, but what it really amounts to is that the "defendant assented to the owners exercising their right to "retake it." He goes on to discuss the question whether or not such a waiver is effective. "The question then arises "whether, if the parties so agree, they can dispense with the "necessity of the owners obtaining the leave of the court "to the retaking of the property in question," and for the

(1) [1940] Ch. 638. (2) [1941] 2 K. B. 1, 4.

C. A.
1941
SMART BROS., LD.
v.
ROSS.
Lord Greene M.R.

rest of the judgment he deals with the case on the basis that there had been an exercise of the remedy conferred by the hire-purchase contract when a breach had taken place. There is no need for me to examine that part of the judgment which deals with the question whether a party can waive the protection conferred by the sub-section or can contract out of it. That that cannot be done is now settled law, and no question on that matter arises in this case. But at the end of the judgment, Goddard L.J. says (1): "We want to add one "further word. We do not desire that it should be thought "that, in cases where a hire-purchase agreement contains "such a clause as 3 (*b*) in the present case"—3 (*b*) was the clause which gave the hirer the right to determine the contract and return the motor-car—"the owners can avoid the necessity "of going to the court by putting pressure on the hirer to "act ostensibly under that clause, when in fact all that they "are doing is getting a consent to seize." That brings out the distinction to which I referred at the beginning of this judgment. The question to be decided in such a case as the present is whether there has been a mere consent to seize or something different. In answering that question the court will not be misled by any amount of ostensible or colourable matter. Goddard L.J. goes on: "Where a hirer "has paid a substantial sum by way of instalments the number "of cases in which, owing to temporary embarrassment caused "by war conditions, he would really be willing to forego the "benefit of all that he had paid must, we think, be very small. "If such a case came before a court, we think it would be "the duty of the court to ascertain whether the return of the "chattel was really and truly the bona fide exercise of the "option given by the clause, or whether, in truth, it was no "more than a submission by the hirer to the owner exercising "his right to seize." Speaking with great respect, I venture to think that nothing could be explained with greater lucidity. It is perfectly clear that in the opinion of Scott L.J. and Goddard L.J., if the goods had been returned by the hirer under the clause in the contract, it would not have fallen

(1) [1941] 2 K. B. 1, 9.

C. A.
1941
SMART BROS., LD. v. ROSS.
Lord Greene M.R.

within the sub-section. If that be right, I cannot see how, if the goods are returned under a bona fide contract made later, it should any the more fall within the sub-section. That case is not in any sense an authority which obliges us to decide the present appeal in favour of Miss Ross. The real transaction which was being carried out was the exercise of the right to seize conferred by the contract, and when once that was established there was an end of the matter so far as anything relating to this case is concerned.

MacKinnon L.J. agreed with the judgment prepared by Goddard L.J. in its entirety, but he added (1): "The protection "given by the Act against coercion will disappear in every "case in which coercion is applied with sufficient vigour to "make the man intended to be protected admit that he is not." Nothing which I have said in any way doubts the accuracy of that observation. It is clear that if a consent by a hirer to a seizure which has been induced by the owners is allowed to become effective the protection of the Act will be entirely illusory. I do not think that I need further pursue the rather embarrassing task of examining the language of MacKinnon L.J. in that case, but I must confess that I do not read it as lending any countenance to the suggestion that, in such a case as the present where there is a bona fide separate contract, a remedy either under the hire-purchase agreement or under the separate contract is being enforced for the purposes of the sub-section any more than would be the case if the possession of the property had been handed back in pursuance of a right conferred on the hirer by the agreement itself. I agree with the decision of Uthwatt J. and I would dismiss the appeal.

MACKINNON L.J. This is an extremely difficult case. The difficulty arises because of the novel terms of the Courts (Emergency Powers) Act, 1939—a piece of legislation which, for very good reasons, perhaps, introduced great interference with our preconceived ideas of freedom of contract—and because those terms are obscure. I find myself also hampered by the fact that there is the previous decision of *Bowmaker, Ld.*

---

(1) [1941] 2 K. B. 10.

v. *Tabor* (1), to which I was a party, a decision which must be differentiated if this case is to have a different result.

There having, in the present case, been default in the payment by Miss Ross of instalments under the hire-purchase agreement, the owners became clothed with the legal right under that agreement to take possession of the goods. To test the question which has arisen, let it be assumed that they have exercised that right and have retaken possession of the goods. Complaint is brought against them: "You have "infringed the provisions of the Courts (Emergency Powers) "Act, 1939, which provides that a person shall not be entitled, "except with the leave of the appropriate court, to proceed "to exercise any remedy available to him by way of the "taking of possession of any property. You became clothed "with the right to take possession of the property under the "default clause in the hire-purchase agreement, and you "have taken possession of that property. Why have not "you broken the terms of the Act?" The answer suggested is: "We have not broken the terms of the Act. It is true "that we were clothed with that right and that remedy. It "is true that in appearance we have exercised that right and "that remedy, but it is not a breach of the Act having regard "to certain communications by way of letters which have "passed between us and Miss Ross after the arising of our "right and before the exercise of our remedy."

Precisely the same defence was relied on in *Bowmaker, Ld.* v. *Tabor* (1). There the right to take possession had arisen and been exercised, but it was argued that there had been no infringement of the Act because, between the arising of the right and its exercise, the hirer had signed a document saying: "I hereby declare that it is my desire voluntarily "to terminate the hiring under the above hire-purchase "agreement and to surrender the vehicle concerned." Would the decision in that case have been different if, instead of the document which had been signed being in the terms which I have just read, it had been in these terms: "In consideration "of the sum of sixpence, which I hereby acknowledge to have

(1) [1941] 2 K. B. 1.

"received from you, I agree to put an end to the hiring of "the goods under the hire-purchase agreement and to "surrender the goods to you"? If that makes all the difference, it is apparent that the protection sought to be provided by this Act, the policy of which has been eloquently set forth by Farwell J. in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1), can be entirely frustrated. I do not think that there is any essential difference between the document which was signed between the arising of the right of the owners to take possession, and their exercise of it, in *Bowmaker, Ld.* v. *Tabor* (2), and a document the effect of which would be exactly the same, but which is in the terms which I have just suggested.

It is said, and it is no doubt true, that the agreement arrived at between the owners and Miss Ross in June, 1941, was not an illusory or colourable contract to achieve an evasion of the Act, but was a genuine contract for good and ample consideration. The answer to that argument is that this is not the occasion on which to consider that question. If I am right in thinking that, before exercising the right to retake possession of the goods with which they were originally clothed, the owners were under an obligation, by reason of the Act, to apply to the court, the court on such an application would readily see that it was a genuine transaction and one which without the slightest hesitation the court would give leave to enforce, but I do not think that it is for this court, in considering whether the Act has been broken, to go on to consider the later question which will arise, namely, whether in the circumstances leave to enforce the remedy ought to be given.

It has been argued by Mr. Pereira, and I agree, that there is a considerable vagueness in the meaning of the word "remedy" in s. 1, sub-s. 2 (*a*) (ii.), of the Act, and it may be that it was equally difficult in *Bowmaker, Ld.* v. *Tabor* (2) to say that the owners were exercising a remedy rather than a right. If what they did in *Bowmaker, Ld.* v. *Tabor* (2) was exercising a remedy, I think that what the owners desire to do in the present case is equally an exercise of a remedy, although in both cases it might well be said that it was not so much a remedy as a right. The truth is, I think, that by taking the goods the owners would be exercising the remedy which was given to them by the hire-purchase agreement, which had come into existence by virtue of the terms of the agreement, and which arose on the default of Miss Ross under the agreement. In my view they would none the less be exercising that remedy although they can say that between the initiation and the exercise of their right certain communications passed between them and Miss Ross, and a certain other contract was made between them and her.

---

(1) [1940] Ch. 638.

(2) [1941] 2 K. B. 1.

It results from these considerations that, most unhappily, I find myself unable to come to the same conclusion as the Master of the Rolls, and I think that this appeal should be allowed.

CLAUSON L.J. In this case I have the misfortune to find myself unable to accept the views expressed by Uthwatt J. and to agree with the views expressed by the Master of Rolls. In the result, I am in agreement with those expressed by MacKinnon L.J. I should have been glad to confine myself to expressing my concurrence with his views, but as I approach the matter from a somewhat different angle, I am afraid that I must express somewhat at length the reasons for the conclusions at which I have arrived.

The summons is taken out by a company who have been spoken of as " the owners," and they claim by their summons to be entitled to retake possession of certain articles from Miss Ross under the terms of an instrument in writing which is undated, but was made on or about June 5, 1941. It is common ground that the instrument consists of certain letters, and I want to observe that the owners are claiming to retake possession under the terms of a document which is dated after the coming into force of the Courts (Emergency Powers) Act, 1939. Since *Bowmaker, Ld.* v. *Tabor* (1) was decided, a further Act, the Liabilities (War-Time Adjustment)

(1) [1941] 2 K. B. 1.

Act, 1941, has been passed, and, although it has not been referred to in argument, I do not feel that I should be doing my duty if I did not draw attention to its provisions.

As the Courts (Emergency Powers) Act, 1939, stood at the time of the decision in *Bowmaker, Ld.* v. *Tabor* (1), there was a proviso to sub-s. 2 of s. 1 in these terms: "Provided "that this sub-section shall not apply to any remedy or "proceedings available in consequence of any default in ". . . . the performance of an obligation . . . . arising by "virtue of a contract made after the commencement of this "Act." By s. 26, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, Part II. of which is entitled "Extension of certain enactments to contracts made after "commencement of war": "A person shall not be entitled, "except with the leave of the appropriate court—(*a*) to "exercise or take any of the remedies or proceedings "mentioned in sub-s. 2 of s. 1 of the principal Act, other "than those mentioned in para. (*c*) and para. (*d*) "—we are not concerned with those paragraphs—"of the proviso to "that sub-section, which are available to him in consequence "of any default in . . . . the performance of an obligation ". . . . arising by virtue of a contract made after the "commencement of the principal Act."

As I envisage the matter, what the owners are seeking to do is to obtain a decision that, without applying to the court for leave under the Courts (Emergency Powers) Act, 1939, they may exercise the remedy available to them by reason of the contract contained in the correspondence, the remedy being that in default of the goods being returned to them—a rather inaccurate expression in the circumstances—they may retake possession of them. It appears to me that in claiming to retake possession of the articles the owners are proceeding to exercise a remedy which is available to them in consequence of a default in the performance by Miss Ross of the obligation by her to return the goods. If that is so, I can see no escape from the position that they are claiming to do something which is distinctly and clearly forbidden by

(1) [1941] 2 K. B. 1.

C. A.
1941
SMART BROS., LD.
v.
ROSS.
Clauson L.J.

the Act. The act of retaking possession, that is to say, the act of turning themselves from bailees into owners, is one which they claim the right to do by virtue of the contract of June, 1941, and they are doing it by way of remedy so as to obtain for themselves the benefit of the contract. I see no escape from the position that that is forbidden by the Act, and, accordingly, that Uthwatt J. came to a wrong conclusion.

I agree that on my interpretation of the Act (and I wish I could find some more limited interpretation) the Act will hit a large number of transactions which it can hardly be supposed that the legislature intended to hit. It may be that the legislature thought that actions would not be raised where there was no real need for them, but the fact that the legislature may have enacted something which goes beyond what one would suppose to have been its original intention, does not, in my view, justify me in putting a limitation on the words of the Act for which I can find no justification on the words as they stand.

The contract under which the owners seek to take possession is an instrument in writing, undated, but made on or about June 5, 1941, namely, the contract contained in the correspondence. That is the material contract, and but for the change of the law in 1941 there might have been considerable difficulty, because the contract material to be considered is one made after the commencement of the Courts (Emergency Powers) Act, 1939.

For these reasons I agree with MacKinnon L.J. that the appeal should be allowed.

Appeal allowed.

Solicitors for both parties: *Tudor & Rowe.*

P. J. B.

UTHWATT J.
1941
Oct. 28, 29;
1942
Jan. 22.

WORTHING CORPORATION *v.* SOUTHERN RAILWAY COMPANY.

Rates—Railway—Amendment of current valuation list—Proposal made after end of first railway quinquennial period, but before completion of second valuation roll—Validity—Railways (*Valuation for Rating*) *Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 18, *sub-s.* 3.

The railway valuation roll referred to in s. 18, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, means the roll by virtue of which the hereditament appears in the valuation list, and not the roll governing the quinquennium in the course of which the proposal is made.

On April 27, 1934, the first railway valuation roll relating to the undertaking of the Southern Railway was completed under the Railways (Valuation for Rating) Act, 1930, Worthing station, part of which consisted of a coal wharf and office licensed to be used by coal merchants, being entered in it as a railway hereditament. The wharf premises and their value were duly entered in the valuation list kept by the borough of Worthing under the Rating and Valuation Act, 1925. On February 27, 1937, in consequence of the decision in *Westminster City Council* v. *Southern Railway Co.* [1936] A. C. 511, that premises on a railway station let to or licensed to be used by tenants were not railway hereditaments, Worthing Corporation presented a proposal under s. 37 of the Rating and Valuation Act, 1925, to the Worthing area assessment committee to amend the valuation list by separately assessing the wharf and office as not being a railway hereditament so as to enable the corporation to recover the general rate for the premises as from April 1, 1936, when the first railway roll expired. The second railway roll relating to the Southern Railway, which did not include the above premises as part of a railway hereditament, was completed in January, 1939, and took effect as from April 1, 1936, for the five years following. On a summons taken out under R. S. C., Or. LIV., r. 1 (*a*), asking whether, on the true construction of the Acts in question, the proposal was valid and effective, and whether the corporation were entitled to have it heard and determined :—

Held, that, as at the date when the proposal was made the premises in question were still for the time being shown on the railway valuation roll as part of a railway hereditament, the proposal was ineffective, and the assessment committee were not entitled to hear it.

ADJOURNED SUMMONS.

The plaintiffs, Worthing Corporation, took out this summons under R. S. C., Or. LIV, r. 1 (*a*), asking whether, on the true construction of the Rating and Valuation Act, 1925, and of the Railways (Valuation for Rating) Act, 1930, and in the events which had happened, a proposal made by them, dated February 22, 1937, to the Worthing area assessment committee to amend their valuation list by separately assessing a coal wharf and office at Worthing station belonging to the defendants, the Southern Railway Company, and licensed by them to be used by a firm of coal merchants, being part of the railway hereditament consisting of Worthing station and entered as such on the railway valuation roll prepared under the Act of 1930, was a valid and effective proposal, and, if so, whether they had a right to have it heard and determined by the Worthing area assessment committee, and, on an amendment being made in the valuation list, to recover the general rate in respect of the premises in question current at the date and the rates in subsequent years.

The part of the first railway valuation roll made under the Railways (Valuation for Rating) Act, 1930, which related to the undertaking of the Southern Railway was completed on April 27, 1934, and took effect from April 1, 1931. In that roll the wharf and office, with other hereditaments occupied by the Southern Railway in the borough of Worthing, were included, a net annual value and a rateable value being, pursuant to s. 8 of the Act of 1930, attributed to them. In due course the hereditaments and the values so attributed to them were, in accordance with s. 12 of the Act of 1930, entered by the assessment committee on the valuation list for the borough of Worthing kept under the Rating and Valuation Act, 1925. On May 20, 1936, the House of Lords gave its decision in *Westminster City Council* v. *Southern Railway Co.* (1), and on February 22, 1937, the plaintiffs, who were the rating authority for the borough of Worthing, anticipating that in the second railway valuation roll the coal wharf would not appear as a railway hereditament occupied by the Southern Railway Company and affecting to act under s. 37 of the Rating and Valuation Act, 1925, made a proposal for the amendment of the valuation list by the separate assessment of the coal wharf on the ground that it was not a railway hereditament. On January 27, 1939, the part of the second railway valuation roll which related to the undertaking of the Southern Railway Company was completed and in that roll the wharf and office did not appear as a railway hereditament. This part of the roll took effect for all purposes as from April 1, 1936: see s. 17 of the Act of 1930. No step directed to the hearing of the proposal was taken.

---

(1) [1936] A. C. 511.

Turner K.C. and *Neep* for the plaintiffs. The proposal of February 22, 1937, was a valid and effective proposal, and the assessment committee have power to hear and determine it. After the decision in *Westminster City Council* v. *Southern Railway Co.* (1) it became clear that the wharf and office, although it figured on the first railway valuation roll as a railway hereditament, was not in law a railway hereditament, and would not appear in the second roll, when completed, as such. The second roll was completed on January 27, 1939, and the hereditament did not appear in it. That roll on completion dated back to April 1, 1936. The property was occupied and undoubtedly rateable, and if a valid proposal could not be made during the interval between April 1, 1936, and January 27, 1939, it would escape rating for the period April 1, 1936, to April 1, 1938. The proposal did not relate to a " hereditament for the time being shown "in the railway valuation roll as a railway hereditament", within s. 18, sub-s. 3, of the Railways (Valuation for Rating Act, 1930 (2), which renders such a proposal invalid. By

---

(1) [1936] A. C. 511.

(2) By Railways (Valuation for Rating) Act, 1930, s. 18, sub-s. 1: " As from the appointed day, a " rating authority, in preparing a " draft valuation list or a new " valuation list under the Rating " and Valuation Acts, shall enter " therein in respect of any here" ditament for the time being " shown in the valuation roll as a " railway hereditament the values " and other particulars appearing " in respect of that hereditament " in the valuation list for the time " being in force, and while that " hereditament remains in the " roll, no amendment shall be " made in the values or parti" culars so entered except in " pursuance of a notice sent " to the assessment committee " by the Railway Assessment " Authority under the provisions " of this Act relating to the " notification to assessment com-

s. 3, sub-s. 2, of the Act of 1930, the first railway valuation roll ceased to be in force on April 1, 1936, although the second roll had not yet been completed. Therefore, on February 22, 1937, the roll referred to in s. 18, sub-s. 3, could not be the first roll which was then no longer a roll, but only a piece of paper the validity of which had expired. If the second roll had been completed before February, 1937, there could have been no doubt that the proposal would have been valid. There can only be one roll in force at any moment, and in February, 1937, the second roll was in force, although it was not then complete.

Scott Henderson for the Worthing area assessment committee.

Craig Henderson K.C. and *Colin Pearson* for the Southern Railway Company. The only way in which a valuation list can be altered is by a proposal under s. 37 of the Rating and Valuation Act, 1925, and any such proposal must be considered by the assessment committee in the light of the facts known at the date of the proposal: see *Barratt* v. *Gravesend Assessment Committee* (1). In February, 1937, the wharf premises were not entered on the railway roll as a separate hereditament. They were entered as a railway hereditament, and the effect of s. 18 of the Act of 1930 is that if property is once entered on the railway roll as a railway hereditament it remains on that roll until the Railway Assessment Authority decides otherwise and takes it off the roll. The only body which has jurisdiction to decide what is and what is not a railway hereditament is the Railway Assessment Authority. In February, 1937, the assessment committee had no power to alter the railway roll. The first railway roll did not expire on April 1, 1936, as the plaintiffs contend, but it remained in force until it was superseded by the second roll, the

" mittees of values and of alterations of values of railway " hereditaments."

By sub-s. 3: " The provisions " of the Rating and Valuation " Acts with respect to . . . . the " revision or amendment of " current valuation lists by means " of proposals, supplemental lists " or provisional lists . . . . shall " not apply in the case of a " hereditament for the time being " shown in the railway valuation " roll as a railway hereditament."

(1) [1941] 2 K. B. 107.

completion of which was delayed by the decision in *Westminster City Council* v. *Southern Railway Co.* (1). Until the second railway roll was completed it could not be said for certain whether or not the wharf premises would be included as part of a larger railway hereditament. There is, no doubt, a casus omissus in the Act, but the court cannot supply the deficiency. The "railway valuation roll" referred to in s. 18, sub-s. 3, for the purposes of this case means the roll in which the hereditament appears as part of a railway hereditament, that is to say, the first, and not the second, roll.

Squibb for the occupiers of the wharf premises. The proposal was made, not because the hereditament was not part of a railway hereditament when the first railway roll was made, but because it appeared that, in view of the decision in *Westminster City Council* v. *Southern Railway Co.* (1), it would not be included as part of a railway hereditament when the second roll was completed. If the proposal had gone through and the hereditament had been entered in the valuation list as not being a railway hereditament, for two years two different rates would have been payable in respect of the same property. The Act should not be interpreted so as to bring about such a strange and inequitable result.

Turner K.C. replied.

Cur. adv. vult.

1942. Jan. 22. UTHWATT J. The question at issue is whether or not this proposal is a nugatory document. No point is taken on its form, and the determination of the matter at issue depends solely on the true construction of the Rating and Valuation Act, 1925, and the Railways (Valuation for Rating) Act, 1930.

The power to make a proposal for the amendment of the valuation list is conferred by s. 37 of the Act of 1925. Under that section any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force or by the inclusion therein or omission therefrom of any matter may make a proposal for the amendment of the list and provision is then made by sub-s. 11 of s. 37 for the prompt hearing and determination of the proposal. If an amendment is made in pursuance of a proposal made by the rating authority, then under sub-s. 10 of s. 37 it is deemed to have had effect, as regards the rate current at the date of notice of the proposal, as from the commencement of the period in respect of which the rate was made, and it also has effect for the purpose of any subsequent rate. Sub-sect. 3 of s. 18 of the Act of 1930, which has to be considered in connection with the other provisions of the Act of 1930, provides, inter alia, that the provisions of the Act of 1925 with respect to the amendment of current valuation lists shall not apply in the case of a hereditament for the time being shown in the railway valuation roll as a railway hereditament.

---

(1) [1936] A. C. 511.

The ultimate question, to my mind, is whether the phrase "railway valuation roll" in s. 18, sub-s. 3, of the Act of 1930 means—(*a*) the valuation roll by virtue of which the coal wharf at the date of the making of the proposal appears on the valuation list, or (*b*) the valuation roll which governs the quinquennium in the course of which the proposal is made. If the former meaning is attributed to the phrase, the machinery for altering the valuation list by means of action taken under proposals was not available at the date when the proposal was made, and it would appear that (subject to the effect of a proposal made after the second valuation roll had come into being or the effect of a new valuation list made after that date) a hereditament which appeared in the first valuation roll as a railway hereditament but did not so appear in the second valuation roll—in this case the coal wharf—would escape liability for rates. If the latter meaning is attributed to the phrase, the machinery in question was available, and there is an effective means of securing the appearance in the valuation list of the coal wharf and other hereditaments in the like case as from the beginning of the quinquennium governed by the second valuation roll. The phrase as it appears in s. 18, sub-s. 3, taken alone, is capable of either meaning. The meaning proper to be attributed to it can only be determined on a consideration of the general scheme of the Acts of 1925

UTHWATT J.
1942
WORTHING CORPORATION v. SOUTHERN RAILWAY CO.

and 1930 and such assistance as may be obtained from the matters of detail embodied in its provisions.

The Act of 1925 contemplated that, subject to certain provisions applicable to particular classes of property to which it is not necessary to refer, particulars of every hereditament in a rating area and of its value were, through the machinery provided by the Act, to appear in the valuation list: see s. 25. Save for exceptions immaterial for present purposes, each valuation list remains in force for five years when it is superseded by a new valuation list. No machinery is provided by that Act for carrying over to a succeeding valuation list any entry appearing in its predecessor. Until the Act of 1930 came into operation property comprised in the undertaking of railway companies was dealt with under the Act of 1925 for purposes of rating. The Act of 1930, which is to be construed as one with the Act of 1925 (see s. 24 of the Act of 1930), sets up an entirely new machinery for the ascertainment by the Railway Assessment Authority constituted under that Act of the net annual value and rateable value of the railway hereditaments occupied by a railway company and for the entry by that authority of the values so ascertained on instruments called railway valuation rolls. The leading provision in the Act of 1930 is contained in s. 1 and enacts that the provisions of the Rating and Valuation Acts relating to the ascertainment of the values of hereditaments are as from April, 1931, except as expressly provided by the Act of 1930, to cease to apply in the case of railway hereditaments in England occupied by a railway company, and the values of all such hereditaments are to be the values thereof as ascertained in accordance with the Act of 1930. Railway hereditaments are defined in s. 1, and it is unnecessary for me to refer to their definition. Provision is then made under which the Railway Assessment Authority are, as soon as may be after their constitution and thereafter at intervals of five years, to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament in England: see s. 3, sub-s. 1. Sect. 3, sub-s. 2, is as follows: "The first railway valuation roll shall come into "force on the appointed day, and every subsequent railway "valuation roll shall come into force at the expiration of five "years from the day appointed by this sub-section for the "preceding roll to come into force, and the period during which "any roll is in force is in this Act referred to as a 'quinquennial "'period.'" The appointed day is, as regards London, April 1, 1931, and, elsewhere, April 6, 1931. It may be here observed that the quinquennial period during which the railway valuation roll remains in force does not correspond with any period for which a valuation list remains in force. Then there follow provisions stating the principles on which the net annual value of the railway undertaking of each railway company affected by the Act is to be determined for the purposes of the railway valuation roll, and (s. 6) for the apportionment of that value among all the railway hereditaments occupied by the company. In my opinion, the railway hereditaments referred to in s. 3, sub-s. 1, and s. 6 are the railway hereditaments in the occupation of the railway company at the beginning of the quinquennium which is to be governed by the roll.

The procedure provided for the preparation of the roll as regards each railway undertaking is shortly as follows. The first step is the settlement of a draft of the part of the roll relating to the undertaking. Information as to its contents and the date on which it was settled is to be sent to the railway company, the county valuation committees, and the rating authorities concerned. Representations may be made to the Railway Assessment Authority on matters dealt with by the draft, including any proposal to treat any premises as being or as not being a railway hereditament. After consideration of any representation, the Railway Assessment Authority are so soon as may be to determine the net annual value of the undertaking and the net annual value and rateable value of each hereditament: see s. 7 and sch. III. The roll, when completed, is to include (inter alia) the net annual value and the rateable value of every railway hereditament occupied by the company: see s. 8, sub-s. 2. Sect. 8, sub-s. 3, provides that the Railway Assessment Authority shall, on the request of any railway company, county valuation committee, or rating authority, state whether any particular premises have or have not for the purposes of the Act been treated by them as forming part of a railway hereditament, and that statement is to be deemed to form part of the roll and binding on all persons. Appeals may be made to the Railway and Canal Commissioners in respect of entries on the roll on grounds specified in s. 9, sub-s. 2, among which are included the ground that premises have been incorrectly treated as being or as not being a railway hereditament and the ground that the net annual value and the rateable value of a railway hereditament has been determined incorrectly. After the roll has been completed it may be revised under s. 10. Provision is made by s. 11 for alterations being made to the roll on representations being made to the Railway Assessment Authority. The detailed provisions of s. 11 are immaterial. It is important to observe, first, that, although representations must be made during the quinquennial period, there is nothing in the Act which precludes those representations being dealt with by the Railway Assessment Authority after the quinquennium during which the roll is to be in force has expired. Secondly, the changes in occupation or in the nature of occupation which are to be taken into account are changes which have occurred since the date on which the draft of the relevant part of the roll was settled. Sect. 17 of the Act of 1930 provides as follows: "Any failure on the part of the "Railway Assessment Authority to complete the whole or "any part of a railway valuation roll before the date upon "which under the provisions of this Act the roll is to come into "operation, shall not of itself render the roll or any part thereof "invalid, and each part of the roll as and when complete "shall for all purposes take effect as from the said date."

One then comes to the provisions which deal with the relation between the railway valuation roll and the valuation list and the effect of the entries on the roll for rating purposes. Sect. 6, sub-s. 1, of the Act of 1930 provides in general terms that the amount of the net annual value of an undertaking apportioned to a hereditament by the Railway Assessment Authority shall for rating purposes be deemed to be its net annual value. Under s. 8, sub-s. 4, of the Act of 1930 it is the duty of the Railway Assessment Authority to notify the assessment committees of the completion of any part of the roll, together with all relevant information, and it is the duty of the assessment committee under s. 12, sub-s. 1, when they have received this notice, to cause the values entered in the railway valuation roll and the prescribed particulars to be entered in the valuation list in substitution for values or particulars appearing in that list. Under s. 12, sub-s. 2, particulars of any alteration made by the Railway Assessment Authority in the railway valuation roll, either in revising the roll or at a date subsequent thereto, are to be sent to the assessment committee, and (s. 12, sub-s. 3) the assessment committee then come under an obligation to amend the valuation list so as to make it accord with the roll. The obligation imposed by s. 12, sub-s. 3, extends in terms to valuation lists which have ceased to be in force. Sect. 12, sub-s. 1, does not in terms so extend, but for the purposes of both sub-sections the valuation list includes a new valuation list which has not yet come into force. I need not refer in detail to sub-ss. 4 and 5. They deal with the dates as from which an amendment has effect in relation to rates. [His Lordship read s. 18, sub-ss. 1 and 3 of the Act of 1930.]

I have referred to several of the detailed provisions of the Act of 1930, but none of them is, I think, of any assistance in connection with the point which I have to decide. Sub-sect. 1 of s. 12 is colourless, for the entries on the valuation list to be made by reason of the contents of a new railway valuation roll apply to all entries in that list, whether or not they appear in that list by reason of the contents of a prior valuation roll. Sect. 18, sub-s. 1, which requires entries made in the valuation list by virtue of a railway valuation roll to be carried over to new valuation lists is perfectly general, but it has no bearing on the point of construction under consideration, for the necessity for some such provision arises from the lack of coincidence between the period for which a railway valuation roll is in force and the period for which a valuation list is in force. One merely has the fact that, while the railway valuation roll is to be in force for a particular quinquennium, there is no provision limiting the continuance of an entry on the valuation list made in obedience to that roll. Again, on the view I take as to the meaning of s. 11, a railway valuation roll which has ceased to be in force, remains as a document capable of alteration after the expiry of the quinquennium which it governs, but this fact has little bearing on the point of construction.

To my mind, the only guidance as to the meaning of the phrase is to be obtained from a consideration of the general intendment of the Act. As to this, it appears to me that the whole scheme of the Act of 1930 is that it is the exclusive function of the Railway Assessment Authority (subject, of course, to appeal) through the medium of the railway valuation roll to determine for the purposes of the Acts what hereditaments are or are not railway hereditaments, and that it was intended to exclude the possibility of this question being raised before any other tribunal. If it was competent to raise before an assessment committee the question whether a particular hereditament was or was not a railway hereditament, it would be the duty of the assessment committee to deal with the question promptly and conceivably (as would be the case here) before the Railway Assessment Authority had dealt with the matter. The committee might arrive at a conclusion different from that subsequently arrived at by the Railway Assessment Authority, but their conclusion would be displaced by the retrospective action of the railway valuation roll when completed. Inconclusive proceedings before an assessment committee could not, in my opinion, have been contemplated.

Next, one is met with the fact that the Act of 1930 itself contemplates in s. 17 that the valuation roll may not be completed until after the quinquennium which it is to govern has begun, and, indeed, it may, perhaps, be surmised that this would normally be the case. So far as I can see, the Act would work without any capricious operation if a draft valuation roll were settled before the beginning of the quinquennium to be governed by the valuation roll (see the provisions of s. 11 as to the date to be taken into account for purposes of changes in occupation or nature of occupation), and if the valuation roll itself were completed an appreciable time before the expiration of the first year of the quinquennium which it was to govern (see the provisions of s. 37, sub-s. 10, of the Act of 1925 as to the date from which amendments of the valuation list are to have effect). Difficulties only arise if the valuation roll appears at a later date.

In my opinion, it would be wrong in the circumstances to construe the phrase "the railway valuation roll" in s. 18, sub-s. 3, as meaning the railway valuation roll for the time being in force inasmuch as such a construction would enable a rating authority immediately on the expiry of any quinquennium governed by a railway valuation roll to bring forward for consideration and determination by the Assessment Committee as regards any hereditament appearing on the valuation list as a railway hereditament the question whether it was or was not a railway hereditament, provided only that the succeeding valuation roll had not then made an effective appearance. That could not have been intended. On the other hand, if one attributes to the phrase the meaning "railway "valuation roll by virtue of which the hereditament appears on "the valuation list," one reaches a conclusion which gives effect to the general scheme of the Act and does not—save in the case of a very late appearance of the roll—work any capricious result. The fact appears to be that the provisions of the Act are not directed to meeting the case of a very late appearance of the roll. If that is to be remedied, resort must be had to the legislature and not to the lawyer. I, accordingly, declare that on the true construction of the Rating and Valuation Acts, 1925 to 1930, and in the events which happened, the proposal dated February 22, 1937, is ineffective and nugatory.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for Town Clerk, Worthing.*

Solicitors for assessment committee: *Waller, Neale & Houlston, for Marsh & Ferriman, Worthing.*

Solicitor for Southern Railway Co.: *H. L. Smedley.*

Solicitors for occupiers: *Braby & Waller.*

H. L. L.

C. A.

1942

Jan. 19, 20; Feb. 2.

WOOD *v.* SMALLPIECE.

Emergency legislation — Mortgage — Foreclosure — Possession — Order for possession in order absolute—Enforcement—Writ of possession—Leave to issue—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 3; *s.* 3, *sub-s.* 2—*Possession of Mortgaged Land (Emergency Provisions) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 108), *s.* 1, *sub-s.* 1; *s.* 2, *sub-ss.* 1, 2.

An order for foreclosure absolute granted to a mortgagee who, in accordance with s. 1, sub-s. 2, para. (*b*), of the Courts (Emergency Powers) Act, 1939, had obtained leave to proceed for foreclosure, contained a consequential order for possession with which the mortgagor did not comply. On an application by the mortgagee for leave to issue a writ of possession under s. 1, sub-s. 3, of the Courts (Emergency Powers) Act, 1939, as amended by s. 2, sub-s. 1, of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939:—

Held, that the order for delivery of possession contained in a foreclosure order absolute is not a " judgment or order . . . . for " the recovery of possession of land by a mortgagee thereof by " reason of a default in the payment of money " within s. 1, sub-s. 3, of the Act of 1939, as amended, and, therefore, no leave to issue the writ of possession was necessary.

Decision of Morton J. affirmed.

APPEAL from Morton J.

Robert Leslie Wood, the mortgagee under a legal charge dated December 18, 1934, obtained against the mortgagor, Mark Smallpiece, after default in payment, leave, pursuant to s. 1, sub-s. 2, para. (*b*), of the Courts (Emergency Powers) Act, 1939, to proceed for foreclosure (1). An order nisi for foreclosure was made on August 16, 1940, and an order for

---

(1) By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 3: " Subject to the provisions of this " section, a person shall not be " entitled, except with the leave " of the appropriate court, to " proceed to execution on, or other- " wise to the enforcement of, any " judgment or order of any court " (whether given or made before " or after the commencement of " this Act) for the recovery of " possession of land in default of " payment of rent."

By Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 1, sub-s. 1: " Where any " land is the subject of a mortgage " made before September 3, 1939, " the mortgagee shall not be " entitled to obtain possession " of the land, unless default has " been made in payment of the " mortgage money or any part " thereof or of any interest there- " on, ... " Sub-sect. 3: "This " section shall not apply where " the mortgagee has obtained " possession of the land before the " passing of this Act, but, save

C. A.
1942
WOOD
v.
SMALLPIECE.

foreclosure absolute on June 12, 1941. The mortgagor did not comply with the order to deliver up possession contained in the order absolute, and, by a summons dated August 18, 1941, the mortgagee applied under s. 1, sub-s. 3, of the Courts (Emergency Powers) Act, 1939, as amended by s. 2, sub-s. 1, of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, for leave to enforce the order absolute by the issue of a writ of possession. The summons was adjourned into court, and, on November 18, 1941, Morton J. held that no leave to issue a writ was necessary and made no order on the summons. The mortgagor appealed.

A. H. Pocock for the mortgagor.

Lindner for the mortgagee. Morton J. based his finding on the decision of the Court of Appeal in *S. and A. Services, Ld.* v. *Dickson* (1) where it was held that, where the plaintiff company had obtained an order for the return to it of a chattel let on hire on the default of the defendant in paying instalments of rent becoming due after the commencement of the war, the plaintiff company was entitled to obtain the issue of a writ of delivery under R. S. C., Or. XLVIII., r. 1, without obtaining

---

"as aforesaid, shall apply in "relation to proceedings com"menced before the passing of "this Act as well as in relation to "proceedings commenced there"after; and where an order or "judgment for the recovery or "delivery of possession of land by "[*sic*] a mortgagee thereof has "been made or given before the "passing of this Act, then, unless "the contrary appears, there shall "be deemed to have been a "default in the payment of "money and the order or judg"ment shall be deemed to have "been made or given by reason "of that default: . . . ."

By s. 2, sub-s. 1: "Subsection 3 "of s. 1 of the Courts (Emergency "Powers) Act, 1939 . . . . shall "have effect as if after the words "'payment of rent' there were "inserted the words 'or for the "'recovery of possession of land "'by a mortgagee thereof by "'reason of a default in the pay"'ment of money.'" Sub-sect. 2: "At the end of section three of "the said Act . . . . there shall be "inserted the following subsection: "'(2.) References in this Act to "'judgments or orders for the "'recovery of possession of land "'include references to any judg"'ment or order the effect of which "'is to enable a person to obtain "'possession of land, and in par"'ticular includes in relation to "'a mortgagee, a judgment or "'order for the delivery of posses"'sion of land.'"

(1) [1940] 2 K. B. 219.

C. A.
1942
WOOD
v.
SMALLPIECE.

the leave of the court under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939. [He referred to s. 1, sub-s. 3, of that Act, as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, and by s. 4, sub-s. 1, of the Courts (Emergency Powers) Act, 1940, and to s. 3, sub-s. 2, of the Act of 1939.] In *Whitstable Urban District Council* v. *Tritton* (1) the plaintiff council served on the defendant notice to quit a house of which he was tenant and, on his failure to comply with it, obtained an order for possession from the county court judge, who held, on application for a writ of possession, that leave must first be obtained under the Courts (Emergency Powers) Act, 1939. The Court of Appeal held that leave was not required. For the assistance of the court two arguments which might be advanced in favour of the mortgagor should be stated. In the order for foreclosure absolute the mortgagor is directed to deliver possession to the mortgagee, which, it might be contended, has the effect of bringing the order within the new s. 2, sub-s. 3, of the Courts (Emergency Powers) Act, 1939. Secondly, it might be contended also that, in the reference in that sub-section to judgments and orders for the recovery or delivery of possession of land, the phrase "judgment for the recovery of "possession" correctly describes the common law relief to a mortgagee seeking possession, and the phrase "order for "delivery of possession" relief granted in equity and, therefore, the order for possession in a foreclosure order absolute. An order for foreclosure absolute, however, is not an order enabling a person to take possession of land. It is an order putting an end to a right, title or interest, and is ancillary to the order divesting the mortgagor of his interest in the land. In the present case the "judgment or order" sought is by reason, not of default in the payment of money, but of the foreclosure order.

Pocock replied.

Cur. adv. vult.

1942. Feb. 2. LORD GREENE M.R. read the following judgment of the court (LORD GREENE M.R., LUXMOORE and

(1) [1941] 3 All E. R. 405.

GODDARD L.JJ.). This appeal raises a question as to the application of the Courts (Emergency Powers) Acts to foreclosure proceedings. The point is one of practical importance, and we were informed by counsel that different views had been taken in Chancery chambers with regard to it.

It is, we think, clear that under the Courts (Emergency Powers) Act, 1939, as originally passed, the leave of the court to issue a writ of possession consequential on an order for foreclosure absolute was not required in the case of proceedings instituted after the commencement of the Act. The only provision in the Act which affects foreclosure proceedings is that contained in s. 1, sub-s. 2, para. (*b*), under which, in the case of proceedings instituted after the commencement of the Act, the only leave required is that which must be obtained before the proceedings are instituted. The real question and, in our opinion, the only question on which any doubt could be entertained is whether the position has been altered by subsequent legislation.

The only statute which it is necessary to consider is the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, which received the royal assent some three weeks after the Courts (Emergency Powers) Act, 1939. It was passed to remedy an obvious defect in that Act, which had made no provision for the case of a mortgagee desirous of enforcing his common law right to obtain possession. It was, accordingly, provided that, in the case of mortgages made before September 3, 1939, the right to obtain possession should be exerciseable only in the event of default in payment of the mortgage money or interest thereon or breach of obligation under the mortgage. This restriction does not apply to cases where possession was obtained before the passing of the Act, but it applied equally to proceedings commenced before and after the passing of the Act. In cases where there has been "an order or judgment for the recovery or delivery of "possession of land by" [*sic*: the words "or to" must be supplied] "a mortgagee thereof" there shall be deemed to have been a default in the payment of money unless the contrary appears: see s. 1, sub-s. 3.

Having thus limited the mortgagee's right to obtain possession to cases where a default had taken place, the Act proceeded to bring such cases into line with the default provisions of the Courts (Emergency Powers) Act, 1939. This was effected by an amendment of s. 1, sub-s. 3, of the Courts (Emergency Powers) Act, 1939, a sub-section which prohibited the enforcement of judgments or orders "for the "recovery of possession of land in default of payment of rent" without the leave of the court. The amendment extended the scope of the sub-section by inserting after the words quoted the words "or for the recovery of possession of land "by the mortgagee thereof by reason of a default in the "payment of money." Sect. 3 of the Courts (Emergency Powers) Act, 1939 (the interpretation section), was also amended by the insertion of a new sub-s. 2 in the following words: "References in this Act to judgments or orders for the recovery "of possession of land include references to any judgment or "order the effect of which is to enable a person to obtain "possession of land, and in particular includes in relation "to a mortgagee, a judgment or order for the delivery of "possession of land."

The effect of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, may be summarized as follows. First, the mortgagee's common law right to obtain possession is limited to cases of default. Secondly, where a judgment or order for possession has been obtained by reason of such default it can be enforced only by leave of the court under the Courts (Emergency Powers) Acts, 1939-1940. The mischief with which the Act was obviously intended to deal and the machinery provided for dealing with it are thus reasonably clear. Foreclosure proceedings had already been provided for in the Courts (Emergency Powers) Act, 1939, itself and no reason is apparent why any further protection to the mortgagor in such proceedings was necessary, but it is said that the language of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, is wide enough to cover the case where a mortgagee, having obtained an order for foreclosure absolute, seeks to enforce his consequential right to possession of the mortgaged land. It is pointed out that the order absolute directs the mortgagor to deliver possession to the mortgagee and it is said that this brings the order within the new definition clause. In our opinion, however, this argument does not bear examination. The definition clause is inserted for the purpose of defining the particular subject-matter dealt with which, in the case of mortgages, is judgments and orders for the recovery of possession of land by a mortgagee thereof "by reason of a default in the payment of "money."

The question, therefore, resolves itself into this: Is the order for delivery of possession contained in an order for foreclosure absolute a judgment or order for the recovery of land by or delivery of possession of land to a mortgagee by reason of a default in the payment of money within the meaning of the Courts (Emergency Powers) Act, 1939, as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939? Quite apart from the considerations based on the apparent purpose of the latter Act, we are clearly of opinion that the answer to this question must be in the negative. The effect of an order for foreclosure absolute is to destroy the mortgagor's equity of redemption as the result of his default in payment of the money due under the mortgage and to vest the mortgaged land at law and in equity in the mortgagee. The consequential order for possession is inserted, not by reason of the default in payment of the mortgage money, the effect of which is exhausted by the foreclosure, but in aid of the mortgagee's title as owner of the land. There is, strictly speaking, no need to insert an order for delivery of possession in the order absolute. It is inserted merely for convenience to avoid multiplicity of proceedings. If it were omitted the mortgagee would have to take separate proceedings to recover possession which would be based, not on the mortgagor's default, but on the mortgagee's own title as owner of the land. Confirmation of this view, if needed, is to be found in the fact that if, after foreclosure absolute, a further application to the court were necessary before possession could be obtained, any relief granted to the mortgagor in the matter of the payment of the mortgage money would, in effect, be equivalent to re-opening the foreclosure.

One further point needs mention. The amendments made by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, refer to judgments and orders for the recovery or delivery of possession of land. It is suggested that the phrase "judgment for recovery of possession" is the correct phrase to describe the relief granted at common law to a mortgagee seeking to enforce his common law right to possession, and that the phrase "order for delivery of "possession" is the correct phrase to describe relief granted in equity and is apt, therefore, to describe the order for possession contained in a foreclosure order absolute. This argument is, in our opinion, unsound. If the only relief in the matter of possession which a court of equity could give were that contained in the order for foreclosure absolute, there would be force in it. This, however, is not the case, since orders for delivery of possession in enforcement of the mortgagee's common law right can be made in the Chancery Division under R. S. C., Or. LV., r. 5A, and such applications are now assigned to that division by Or. V., r. 5A. The appeal is dismissed, with costs.

Appeal dismissed.

Solicitors for mortgagor: *Adam Burn & Son, for Triggs, Turner & Co., Guildford.*

Solicitors for mortgagee: *Rising & Ravenscroft.*

K. R. A. H.

In re BOWER'S SETTLEMENT TRUSTS.

BOWER *v.* RIDLEY-THOMPSON.

MORTON J.

1941
Nov. 25, 28.

Settlement—Trust fund—Division into unequal shares—Failure of trusts of any share—Accruer to other shares—Proportions.

The terms of a settlement directed the division of the trust fund into unequal shares to be held in trust for named persons and their children. In the event of failure of the trusts declared concerning any share, it was to accrue by way of addition to the other shares :—

Held, that, in the absence of words indicating the contrary, the accruer should be to the other shares in equal proportions.

Adjourned summons.

On February 15, 1922, Thomas Bower, the settlor, made a settlement of certain property. By cl. 4 of the settlement he directed the trust fund to be divided into eight equal shares. By cl. 5 he directed the trustees of the settlement to pay the income of one of those eighth shares and one-third of another eighth share to his son, Joshua Bower, during his life. By cl. 8 he directed them to hold that part of the trust fund after the death of Joshua Bower on certain trusts for his children and their issue. By cl. 12 : "In case the trusts hereinbefore "declared concerning the one-eighth share and one-third of "one other eighth share of the said Joshua Bower shall fail "then . . . . the said share and any additional share or shares "which may accrue or be added thereto by virtue of the present "proviso and the income thereof respectively shall go and "accrue by way of addition to the other shares and be held "upon the trusts and subject to the powers and provisions "herein declared and contained concerning the original share "or as near thereto as circumstances will admit." By subsequent clauses the settlor appropriated one-eighth share and one-third of another eighth share to his son, Robert Bower ; one-eighth share to his daughter, Marian Bower ; one-eighth share to his daughter, Elizabeth Mercer ; one-eighth share to his daughter, Alice Ridley-Thompson ; one-eighth share to his daughter, Ann Waud ; one half of one-eighth share and one-sixth of another eighth share to his grandson, Thomas Kitchingman Bower; and one half of one-eighth share and one-sixth of another eighth share to his grandson, Herbert Bower. He directed that the parts of the trust fund appropriated to each should be held substantially on trusts "similar to the "trusts hereinbefore declared in favour of the said Joshua "Bower his children and issue and otherwise in the same "manner as if the same were repeated." Robert Bower died a bachelor on November 26, 1940, and the trusts concerning his share failed. On May 20, 1941, Marian Bower, as a trustee of the settlement, took out a summons to determine (inter alia) "whether on the true construction of the 1922 settlement and "in the events which have happened the original and accruing "shares under such settlement of the said Robert Bower, "which accrued on his said death, accrued, and any other "shares, which may hereafter accrue under such settlement, "will accrue, to the other shares (*a*) in equal proportions or "(*b*) in proportion to the original shares to which the same "accrue."

Wilfrid Hunt for Marian Bower.

Lindner (for *T. Burgess*, on war service) for Alice Ridley-Thompson. The accruer to the other shares should be in equal proportions. Equality is equity.

Raymond Jennings for Thomas Kitchingman Bower adopted the argument.

J. A. Wolfe for Joshua Bower. The whole scheme of the settlement is based on inequality. The original shares were unequal, and they should all be treated as a corporate whole. When Robert Bower's share falls into that corporate whole, the division should be in the same proportions as that into which it was originally divided.

Winterbotham for Ailsa Landon, a grandchild of the settlor, and Thomas Edward Bower, a great-grandchild.

Hewins for Herbert Mercer, widower of Elizabeth Mercer.

MORTON J. [having stated the facts:] I have to determine whether Robert's share accrues to the other shares equally or in proportion to the original shares to which it accrues. It is strange that the point does not appear to have arisen before. In my view, in the absence of words indicating the contrary, the accruer should be to the other shares in equal proportions. If I were free to guess what the settlor intended, it may be that I would hold that he intended the division to be in the same proportions as the original shares, but in the words he has used there is nothing to give any one share a greater part of the accrued share than any other share. Mr. Wolfe has pointed out that the settlor has not in the dispositions of the settlement observed equality, but has given the original shares in unequal proportions. He says that all the original shares are treated as a corporate whole and that when Robert's share falls into that corporate whole it must be divided in the proportions in which that corporate whole was originally divided. There is, however, nothing in the words used to justify me in adopting the view contended for, or to enable me to find that the division is to be a proportionate division and not a division in equal shares.

Solicitors: *Austin J. Wright, for Lawson, Lewis & Bairstow, Eastbourne*; *Fisher & Dowson.*

F. C.

In re FORSTER'S SETTLEMENT.

FORSTER *v.* CUSTODIAN OF ENEMY PROPERTY FOR ENGLAND.

MORTON J.
1941
Dec. 16, 17.

Emergency legislation—Trading with the enemy—Settlement—Power of advancement—Exercise with consent of life tenant—Life tenant enemy alien in enemy territory—Need of consent—Death—Presumption of—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 7, *sub-s.* 1—*Trading with the Enemy* (*Custodian*) *Order,* 1939 (*St. R. & O.* 1939, *No.* 1198), *para.* 1 (1.).

A settlement made in 1919 contained a power of advancement by the trustees out of the capital of the settled fund for the benefit of remaindermen with the consent of the tenant for life. On the outbreak of war in 1939, the tenant for life, owing to her having

MORTON J.

1941

FORSTER'S SETTLEMENT, *In re.*

FORSTER *v.* CUSTODIAN OF ENEMY PROPERTY.

married an Austrian citizen in 1930, became an enemy alien, and it was not known if she was still alive or where she was living. A summons was taken out on behalf of infant remaindermen to determine whether the trustees of the settlement could raise a sum out of the capital for their benefit without the consent of the tenant for life :—

Held, that on the evidence the court could not presume the death of the tenant for life, and that her consent to the advance could not be dispensed with.

Semble, an order empowering the Custodian of Enemy Property to give the necessary consent would be in excess of the power conferred on the Board of Trade by s. 7, sub-s. 1, of the Trading with the Enemy Act, 1939.

ADJOURNED SUMMONS.

By a settlement, dated July 9, 1919, to which Eric Leigh Douglas Forster and his wife, Albinia Mathilde Forster, were parties, the trustees were directed to stand possessed of 10,000*l.* and to pay the income thereof during the life of the husband in manner therein mentioned and after his death to "pay the annual income of the trust fund to the "wife if she survives him during the residue of her life." The settlement also provided that, after the death of the survivor of the husband and wife, the capital and income should be held "in trust for all or any of the children or child "of the husband by any marriage who attain the age of 21 "years or being female marry under that age and if more "than one in equal shares." Clause 4, sub-cl. 3, provided: "The trustees may at any time or times but with the consent "in writing of the husband and wife or of the survivor of "them if living raise any part or parts not exceeding together "one half of the presumptive or vested share of any child "or other issue of the husband by any marriage under "the trusts aforesaid and may pay or apply the same for "his or her advancement or benefit as the trustees think "fit." There was no issue of the marriage and on May 5, 1924, a decree of divorce was made absolute against the wife on the petition of the husband. On November 11, 1927, the husband married May Winifred Forster, and three children of the marriage were born in 1928, 1931 and 1935. The husband died on May 31, 1941, leaving his second wife and their three infant children him surviving. In or about 1930, the tenant for life married Baron Schneider, an Austrian subject, and went to live with him in Austria. On the outbreak of war in 1939, she became an enemy alien. It was believed that she was still living in Germany or Austria, but no information relating to her had been received for a considerable time. The trustees wished to raise a sum out of the capital of the trust fund for the benefit of the three infant children, and a summons was taken out, on their behalf, in which the court was asked to determine (inter alia) whether, in view of the facts that it was uncertain whether the tenant for life was alive or dead, and that, if she was alive, it was not known where she was living, the trustees had power to make the advances without her consent.

Geoffrey Cross for the infant children. The trustees can proceed without the consent of the tenant for life. Her power to give that consent has passed to the Custodian of Enemy Property. In *In re Cooper* (1) it was held that a power of advancement, which was exerciseable with the consent of the tenant for life who had become bankrupt, could not be exercised without the consent also of the trustee in bankruptcy. If the consent of the tenant for life cannot be obtained in the present case the Custodian, who is in the same position as was the trustee in bankruptcy in *In re Cooper* (1), is prepared to consent if he has the power to do so. In any case, the court can dispense with the consent of the tenant for life, for it is beneficial for the infant children that the power should be exercised: *Klug* v. *Klug* (2).

Sir William Jowitt S.-G. and *Danckwerts* for the Board of Trade. No order has yet been made vesting the interest of the tenant for life in the Custodian of Enemy Property. The Board of Trade is prepared to make any vesting order which will facilitate the matter and the Custodian will be prepared to give the necessary consent, so far as he can lawfully do so. [He referred to s. 7 of the

(1) (1884) 27 Ch. D. 565.
(2) [1918] 2 Ch. 67.

Trading with the Enemy Act, 1939 (1).] The question is whether any order can be made which will enable the Board of Trade to be of assistance.

Pennycuick for the trustee of the settlement.

Cross replied.

MORTON J. [after reading the material clauses of the settlement :] It is plain from the definition of "the wife" in the settlement that Baroness Schneider, although she was divorced by Mr. Forster and has remarried, is, if she is still alive, the person referred to in cl. 4 (3.) as the "wife." The unfortunate position has, therefore, arisen that prima facie the trustees cannot exercise the power of advancement in favour of the infant children without the consent of a woman who is not

(1) By Trading with the Enemy Act, 1939, s. 7: "(1.) With a "view to preventing the payment "of money to enemies and of "preserving enemy property in "contemplation of arrangements "to be made at the conclusion of "peace, the Board of Trade may "appoint custodians of enemy "property for England, Scotland "and Northern Ireland respectively, and may by order— "(*a*) require the payment to the "prescribed custodian of money "which would, but for the existence of a state of war, be payable to or for the benefit of a "person who is an enemy, or "which would, but for the provisions of s. 4 or s. 5 of this Act, "be payable to any other person; "(*b*) vest in the prescribed custodian such enemy property as "may be prescribed, or provide "for, and regulate, the vesting in "that custodian of such enemy "property as may be prescribed ". . . . (*d*) confer and impose on "the custodians and on any other "person such rights, powers, "duties and liabilities as may "be prescribed as respects: (i.) "property which has been, or is "required to be, vested in a "custodian by or under the "order, (ii.) property of which "the right of transfer has been, "or is required to be, so vested, "(iii.) any other enemy property "which has not been, and is not "required to be, so vested, or "(iv.) money which has been, or "is by the order required to be, "paid to a custodian . . . . and "any such order may contain such "incidental and supplementary "provisions as appear to the "Board of Trade to be necessary "or expedient for the purposes of "the order."

By Trading with the Enemy (Custodian) Order, 1939, made under s. 7, sub-s. 1, para. 1: "(1.) Any money which would, "but for the existence of a state "of war, be payable to or for the "benefit of a person who is an "enemy, and any money which "is to be deemed for the purposes "of the Act to be money which "would, but for the existence of a "state of war, be so payable, "shall be paid to the Custodian."

their mother, is, so far as is known, in enemy territory, and is married to an Austrian baron. There is no doubt, on the evidence, that advancement either is at the moment or in the near future may be urgently required, and I must consider whether there is any ground on which the consent of the baroness may be dispensed with.

[His Lordship read s. 7 of the Trading with the Enemy Act, 1939, and para. 1 (1.) of the Trading with the Enemy (Custodian) Order, 1939.] In the present case no vesting order has been made with regard to the life interest of the baroness, but by reason of the Trading with the Enemy (Custodian) Order, 1939, no money can be paid to her in respect of that life interest. The Board of Trade and the Custodian have shown every desire to assist in this very hard case. The Board of Trade is prepared to make any order which may properly be made and would facilitate the Custodian giving his consent so as to enable an advance to be made to the infant children, and the Custodian will give such consent so far as he may lawfully do so.

In the first place it is clear on the evidence as it stands at present that I cannot presume the death of Baroness Schneider. I must proceed on the footing that she is alive. Mr. Cross, however, submits that her consent is unnecessary, or will become unnecessary if a vesting order is made. He relies on *In re Cooper* (1). In that case Eliza Cooper, who died in January, 1884, by her will, dated in 1883, gave all her property to trustees on trust for conversion and investment, and directed her trustees to stand possessed of the trust funds on trust as to one moiety thereof to pay the income to James Cooper during his life, and after his death in trust for William James, and she declared that the trustees might raise any part or parts not exceeding one half of the share of the said William James, under the trusts thereinbefore declared, and apply the same for his advancement or benefit, subject to the consent in writing of James Cooper during his life. James Cooper became bankrupt in February, 1882, and was still undischarged. The trustees wished to exercise their power of raising a part of the share of William James (who was an infant) for his advancement or benefit. James Cooper was willing to consent, but it was held that he could not do so without the sanction of the trustee in bankruptcy. Mr. Cross submits that the Custodian is now, or will be if a vesting order is made, in the same position as was the trustee in bankruptcy in *In re Cooper* (1). There is much force in that contention, but, in my view, *In re Cooper* (1) in no way supports the further contention put forward by Mr. Cross that the consent of the baroness can be dispensed with. In his judgment in *In re Cooper* (1) Kay J. referred to *Holdsworth* v. *Goose* (2) and *Eisdell* v. *Hammersley* (3) in the following terms: "In a later case of *Holdsworth* v. *Goose* (2) a power "of sale over settled estate was given to trustees, at the "request and by the direction of the tenant for life. The "tenant for life became bankrupt, and it was held that the "power was not extinguished, but that, with the assent of "the tenant for life and his assignees, a perfect title could "be made under the power; thus determining the very "point which was left uncertain in *Badham* v. *Mee* (4) and "*Hole* v. *Escott* (5). Then in the case of *Eisdell* v. "*Hammersley* (3) a power given to trustees to sell realty "with the consent of the tenant for life was held exercisable "after his bankruptcy with the consent of the tenant for life, "and of all persons who had become interested in his estate." It is to be observed that in neither of the two cases to which Kay J. referred was it held that the assent of the tenant for life could be dispensed with. Kay J. continues: "In the "later case of *Alexander* v. *Mills* (6), where the trustees of a "settled estate had a power of sale to be exercised at the "request and direction of a tenant for life, who was also entitled "to the ultimate reversion in fee, and who had made an "absolute conveyance of all his interest for value, it was "held by the Court of Appeal, reversing the decision of Romilly "M.R., that the power of the tenant for life to consent was

---

(1) 27 Ch. D. 565.

(1) 27 Ch. D. 565.
(2) (1861) 29 Beav. 111.
(3) (1862) 31 Beav. 255.
(4) (1831) 7 Bing. 695.
(5) (1838) 4 My. & Cr. 187.
(6) (1870) L. R. 6 Ch. 124.

"not extinguished by the absolute alienation of his life estate, "and could still be exercised with the concurrence of the "alienee." Kay J. concludes his judgment by saying: "I "am clear that, although the exercise of the power would be "for the benefit of the child, who has nothing whatever to "do with the bankruptcy proceedings, yet without the consent "of the trustee in bankruptcy, acting with the sanction of the "court of bankruptcy, the trustees of the will cannot be "allowed to exercise that power." I think it is impossible to read that judgment without seeing that Kay J. took the view that the consent of the bankrupt himself was necessary, notwithstanding his bankruptcy. Further, it seems to me, *Holdsworth* v. *Goose* (1), *Eisdell* v. *Hammersley* (2) and *Alexander* v. *Mills* (3) all indicate that the consent of the baroness in the present case is still required.

Mr. Cross next contended that the court could authorize the advance on the authority of *Klug* v. *Klug* (4). The head-note of that case is as follows: "Under a will, and "in the events which happened, one third of the testator's "residuary estate was held in trust for his daughter, a married "woman, for her life without power of anticipation and after "her death for her issue, with a gift over in default of her "issue for his sons and their issue respectively. The will "empowered the trustees to raise not more than a moiety "of the vested share for the time being of any of the testator's "said children and to apply the same for the advancement "or benefit of such children in such manner as his trustees "should think fit. Owing to the circumstances of her birth "and to the increased cost of living caused by the war, the "daughter was unable to pay the legacy duty, which was at "the rate of 10 per cent. on her settled share out of her income, "and applied to the trustees for assistance. On a summons "by the trustees the court was of opinion that the trustees "could, in the exercise of their discretion under the power "of advancement, raise and pay the duty out of the corpus "of the settled share, and left them to decide whether they

---

(1) 29 Beav. 111.
(2) 31 Beav. 255.
(3) L. R. 7 Ch. 124.
(4) [1918] 2 Ch. 67.

"would so exercise their discretion. One of the trustees was "willing to exercise the discretion in aid of the daughter, "but the other trustee, the testator's widow, declined to "exercise it because her daughter had married without her "consent :—Held, that the court, in the exercise of its control "over the discretion of the trustees, could direct the trustees "to raise out of the corpus of the settled share a sum sufficient "to pay the duty." In his judgment Neville J. said : " her "letters"—that is the letters of the mother—"show, in my "opinion, that she has not exercised her discretion at all. "What, then, ought the court to do when one trustee very "properly desires to exercise his discretion under the power "for the benefit of a beneficiary and his co-trustee will not "exercise her discretion ? I think that in such circumstances "it is the duty of the court to interfere and, in the exercise "of its control over the discretion given to the trustees, to "direct a sum to be raised out of the capital sufficient to pay "off the mortgage of 250*l.* and two remaining instalments of "the legacy duty, and that is the order I now make." In my view, however, *Klug* v. *Klug* (1) does not assist Mr. Cross. The position in the present case is not that of a trustee refusing or failing to exercise a discretionary power. The parties to this settlement thought fit to provide that a discretion conferred on the trustees should not be exercised without the consent of a particular person. In those circumstances I do not think that the court can say that the power shall be exercised without the consent of that person. Nor do I think that *Klug* v. *Klug* (1) is any authority for saying that the court can take that course.

The possibility was also discussed of the Board of Trade making an order conferring power on the Custodian to give the necessary consent. Nothing that I say with regard to that matter has any bearing on the question whether the Board of Trade could or should confer other powers on the Custodian, for instance, powers exercisable by a tenant for life under the Settled Land Act, 1925, who is an enemy, but I do not think that the conferring on the Custodian of such a

(1) [1918] 2 Ch. 67.

power as is suggested here properly comes within the terms of s. 7. It is to be observed that the section begins: "With a "view to preventing the payment of money to enemies and of "preserving enemy property in contemplation of arrangements "to be made at the conclusion of peace." If such a power as is suggested were conferred on the Custodian in this case, it would really be a power to enable him to diminish the capital, and, consequently, the income, of the fund to the income whereof an "enemy" within the Act is entitled. The Solicitor-General and Mr. Danckwerts felt some doubts whether such a power could properly be conferred on the Custodian, and I confess I share those doubts.

I, therefore, decide that the trustees of the settlement have no power to make advances for the benefit of the infant children out of capital under cl. 4, sub-cl. 3, of the settlement without the consent of Baroness Schneider so long as she is living.

I desire to add that nothing in this judgment is directed to the powers of the court under s. 57 of the Trustee Act, 1925. No application under that section is before me.

Solicitors: *Smith & Hudson, for Harold Michelmore & Co., Newton Abbot; Solicitor to the Board of Trade.*

J. L. D.

C. A.
1941
Nov. 6, 7;
Dec. 18.

ROADWAYS TRANSPORT DEVELOPMENT, LIMITED *v.* ATTORNEY-GENERAL.

Army—Impressment—Vehicle—Case of emergency—Payment of compensation to possessors—Claim by owners—Army Act, s. 113, *sub-s.* 4*; s.* 115*—Army and Air Force (Annual) Act,* 1925 (15 *Geo.* 5, *c.* 25), *sch. II.*

A vehicle having been impressed in a case of emergency under s. 115 of the Army Act for purchase for His Majesty's Forces, payment was made to the persons in possession and not to the owners :—

Held, that s. 113, sub-s. 4, of the Act, as amended by sch. II. to the Army and Air Force (Annual) Act, 1925, applied to impressment under s. 115, and that by reason of the provisions of that subsection payment made to the possessor of the vehicle impressed must be deemed to be payment made to the owner, the owner being left to his remedy against the possessor.

Decision of Farwell J. [1941] Ch. 392 reversed.

Appeal from Farwell J. (1).

On October 24, 1939, a company, named A. Hutchin (Haulage), Ld., was in possession of a lorry unknown to the owners, Roadways Transport Development, Ld., who had let it on hire-purchase terms to certain hirers. On that date, Great Britain being at war and a case of emergency existing, the lorry was seized pursuant to a requisition under s. 115 of the Army Act, by an authorized requisitioning officer. At the time of the impressment the officer was informed that the lorry was the subject of a hire-purchase agreement, and also who were the owners. The lorry was delivered to His Majesty's Forces, and on October 26, the Army Council caused 380*l.* to be paid to A. Hutchin (Haulage), Ld. The owners took out a summons, to which the Attorney-General was made defendant, to determine whether, on the true construction of the Army Act, the payment made to the possessors of the lorry at the time of the impressment was to be deemed a payment made to the owners. Farwell J. answered the question in the negative, holding that the provisions of s. 113, sub-s. 4, of the Act, as amended by sch. II. to the Army and Air Force (Annual) Act, 1925 (1), applied only to impressment under s. 112 and not to impressment under s. 115. The Attorney-General appealed.

---

(1) [1941] Ch. 392.

Sir William Jowitt S.-G. and *Danckwerts* for the Attorney-General. The payment to A. Hutchin (Haulage), Ld., was a good discharge under s. 113, sub-s. 4, of the Army Act, which (as amended) entitles the Army Council to make payment for a requisitioned vehicle to the person in possession of it. Farwell J. has, however, found that s. 113, sub-s. 4, has no application to the requisitioning of an article under s. 115. On the true view ss. 113 and 115 should be read together and s. 113, sub-s. 4, is not limited in its application to impressment under s. 112. In support of this view it is to be noted that s. 113, sub-s. 2, makes sch. VI. to the Act apply for the purposes of fixing the amount to be paid, and sch. VI. applies both to impressment for a temporary purpose under s. 112 and to requisitioning under s. 115. There is no other provision in the Act making sch. VI. apply, and it follows that s. 113, sub-s. 2, must be treated as applying to s. 115 and s. 115, sub-s. 3, is relied on as bringing in s. 113, sub-s. 2. If so, by parity of reasoning, s. 113, sub-s. 4, also applies to s. 115. This view receives support from the history of the Act, and, in particular, from the amendments of the Act since 1913. The payments then in respect of impressments of vehicles were provided for in sch. III. and the Army Annual Act, 1915, by a new s. 115, sub-s. 4, referred to sch. VI. as fixing the rates of payment under s. 115. The Army and Air Force (Annual) Act, 1925, did away with sch. III. and extended sch. VI. to cover payment on impressment under s. 112. On these grounds ss. 113 and 115 must be read together for all purposes. Assuming this to be so, the question still remains whether payment to a possessor is sufficient when he has declared the name and address of the true owner. The provision of s. 113, sub-s. 4, relating to payment is not subject to the same qualification as the earlier statement in sub-s. 4, but is an unqualified statement. Really the plaintiffs are seeking to add to this part of the sub-section qualifying words which are not there. If follows that where in s. 115, sub-s. 4, reference is made to payment being deemed to have been tendered "when a formal receipt for the article setting forth the amount "is handed to the owner or his representative," "owner" must be given the meaning of "possessor."

---

(1) Sect. 112 of the Army Act provides for the requisition of carriages, animals, and drivers for removing regimental baggage and stores on the march.

By s. 113, sub-s. 4, as amended by sch. II to the Army and Air Force (Annual) Act, 1925: "The "possessor of any carriage or "animal at the time of impress-"ment shall be deemed to be the "owner for the purposes of the "procedure of impressment where "it is not otherwise declared at "the time, and payment made to "the possessor shall be deemed to "be payment to the owner. In "the event of the property being "vested in another person or "persons, the possessor shall "notify all others interested in "the property and adjust the "amount received in due propor-"tion. In the event of any "difference arising, the amounts "shall be apportioned on a cer-"tificate of a county court "judge . . . ."

Sect. 115 provides for the requisition by purchase of carriages and vessels in the case of emergency.

Honeyman for the plaintiffs. The meaning of s. 115, sub-s. 4, is not affected by anything in s. 113, sub-s. 4, and under s. 115, sub-s. 4, the formal receipt, which is to be treated as a tender, must be handed to the "owner or his representative." "Representative" there means someone duly authorized by the owner and it cannot be the hirer under a hire-purchase agreement and still less someone who has obtained the article requisitioned from the hirer without the owner's knowledge. Tender is not again referred to in s. 115, but it must have all the legal meanings of a tender and must refer to tender as used in s. 113. Sect. 113 deals only with payment for the furnishing of carriages, animals and drivers "for the purpose of moving the regimental baggage and "regimental stores" of a force along a particular route, and there is an obvious convenience in paying the person in possession for their temporary use. That convenience does not apply when vehicles are being requisitioned and purchased. Sect. 112 of the Army Act was originally in very similar terms to what it is now and s. 113, sub-s. 1, provided for payment for carriages, animals, etc., furnished at the rates specified in sch. III. and at that date s. 115, sub-s. 4, contained express

C. A.
1941
Roadways Transport Development. Ld. v. Attorney-General.

provisions as to payment for vehicles requisitioned. But the National Defence Act, 1888, s. 5, introduced for the first time the actual purchase of carriages, animals, and vessels, and in the light of this the provisions relating to the furnishing of carriages and animals in ss. 112 and 113, cannot apply to a requisitioning and purchase under s. 115. It is to be noticed that s. 115 permits the requisitioning in an emergency of large things such as vessels on canals and navigable rivers, so that its whole ambit differs entirely from the impressment of carriages and horses on a march. No doubt, the fact that sch. VI. is now only made applicable by s. 113, sub-s. 2, gives rise to an inconsistency; but there are even greater inconsistencies in treating s. 113 as applicable to s. 115. Again the provision in s. 113, sub-s. 4, that the possessor is to be deemed the owner " where it is not otherwise declared at the "time " makes the same qualification apply when the possessor is referred to subsequently. It would be a straining of the language to give to the word " possessor " the meaning of "owner " when the possessor has made it clear that he is not in fact the owner. The words " where it is not otherwise "declared " apply to both parts of s. 113, sub-s. 4.

Danckwerts replied.

Cur. adv. vult.

1941. Dec. 18. Lord Greene M.R. Clauson and du Parcq L.JJ. will deliver their judgments first.

The following judgments were read.

Clauson L.J. The problem to be solved on this appeal turns on the true construction of ss. 112 to 118 of the Army Act, as that Act now stands. The Act was enacted in 1881 as the Army Act, 1881, but it has since been amended from time to time. By ss. 112 and 113 provision is made for the compulsory furnishing (by persons having suitable carriages or animals) of carriages, animals and drivers, required for the purpose of moving the regimental baggage and regimental stores of the forces mentioned in a particular route in accordance with the route, and for payment in respect of the

C. A.
1941
Roadways Transport Development, Ld.
v.
Attorney-General.
Clauson L.J.

carriages and animals so furnished at the rates of payment commonly recognized or generally prevailing in the district at the time. Any difference respecting the amount payable is to be fixed by the certificate of a county court judge. Certain ancillary provisions dealing with the matter are set out in sch. VI. to the Act. If a sum is tendered or paid by or on behalf of the Army Council (who seem impliedly to be the persons liable to pay) that sum is to be deemed to be the amount due, unless it is questioned within a stated period. [His Lordship read s. 113, sub-s. 4, of the Army Act, as amended by sch. II. to the Army and Air Force (Annual) Act, 1925]. Sub-sects. 5 and 6 of s. 113 make it the duty of the officer who demands carriages or animals to pay the sums due to the owners or drivers of the carriages or animals, and one third part of the payment is, if required, to be made before the carriage is loaded. If, however, the officer is from any cause unable to pay the amount due to the owner or driver, he is to make up with the owner or driver and sign an account of the amount due to him and forthwith transmit the account so signed to the Army Council who are forthwith to cause the amount named therein to be paid to such owner or driver.

It is necessary, as a preliminary to the consideration of the subsequent provisions of the Act, to form a clear view of the operation of s. 113, sub-s. 4. The opening provision of this sub-section gives the possessor of the carriage or animal in question the right to be treated for all relevant purposes, as between himself on the one side and the officer or the Army Council on the other, as the owner of the carriage or animal unless at the time it is otherwise declared. I confess that I have not been able to come to any final conclusion as to the meaning of those last words. It is not clear who is contemplated by the legislature as making the declaration. Do the words mean: "unless the possessor disclaims ownership," or do they mean "unless the requisitioning officer specifically "refuses to recognize the possessor as a person whom he can "properly regard as being the owner or in place of the owner?" The answer to this question may prove to be material should a question arise whether a person in possession of a carriage or animal may, in any particular case, fall within the description of a person "having" the carriage or animal within the meaning of sub-s. 1 of s. 112 and thus under a legal obligation, if ordered, to furnish the same. For the purposes, however, of the present case the words which have to be construed are the subsequent words "payment made "to the possessor shall be deemed to be payment to the "owner." It was suggested in argument that these words must be read as being subject to the restrictive words "where "it is not otherwise declared at the time." From the point of view of language I am satisfied that this argument is not well founded. Had I thought otherwise I should have found it necessary to form and express a final view as to the meaning of the restrictive words. I feel myself bound to construe the words as to payment as having a general application to the transactions covered by the section, whether or not the declaration referred to in the third and fourth lines of sub-s. 4 has been made. The result, in my judgment, is that where carriages and animals have been furnished in pursuance of the provisions of s. 112, that is, for the purpose of moving the regimental baggage and regimental stores of forces mentioned in a route in accordance with the route, payment for the accommodation provided made to the possessor will protect the Army Council from liability to any other person having rights in the articles furnished. Any such person is left by the legislature to pursue such claims as he may have against the possessor, on whom, by subsequent provisions of sub-s. 4, a duty is laid to adjust the amount received by him in due proportion as between himself and all others interested in the property.

I turn now to s. 115 under which, in circumstances which admittedly exist in the present case, a requisition of emergency may be issued. Such a requisition may require the provision of a number of things in addition to carriages and horses, including such perishables as food and forage, not merely for the limited purpose of conveyance on a particular route, but "for the pur-"pose mentioned in the requisition." By sub-s. 3 of s. 115, all the provisions of the Act as to the provision and furnishing of carriages and animals, including those respecting fines, are to apply in like manner as in the case of the issue in pursuance of the foregoing provisions of the Act (*scilicet* s. 112) of a warrant for the provision (*scilicet* for the purpose of moving the regimental baggage and regimental stores of the forces mentioned in the route in accordance with the route) of carriages and animals, and shall apply to vessels, food, forage and stores in like manner in all respects as they apply to carriages. In my judgment, among the provisions of the Act "as to the provision or furnishing of carriages and "animals" one of the most important, certainly from the point of view of the owner, is that which, as I have indicated above, provides in effect that he is to look for payment in respect of the articles provided or furnished, not necessarily to the Army Council, but to the possessor of the articles if the Army Council has paid the possessor, and I can, accordingly, see no escape from the conclusion that this provision is applicable to the case of a requisition of emergency.

I turn next to sub-s. 7 of s. 115. This provides that whenever a proclamation ordering the Army Reserve to be called out on permanent service is in force (a state of affairs which admittedly prevailed at all times material to the case now before us) a requisition may extend to the provision of carriages, animals, vessels, food, forage and stores, for the purpose of being purchased as well as of being hired. Reading s. 113, sub-s. 4, with s. 115, and in particular sub-ss. 3 and 7 of s. 115, I can see no escape from the conclusion that, although the sums which may become payable in respect of articles, as, for example, a motor car taken for purchase under s. 115, may be very large indeed as compared with the sum payable for a temporary user under s. 112 of a carriage or horse for a limited purpose, nevertheless the legislature has thought fit to make the same provisions in the one case as in the other as regards the person to whom payment is to be made, and that, accordingly, in either case, payment to the possessor is, by virtue of the provisions of s. 113, sub-s. 4, in the one case, and by virtue of that sub-section as extended by s. 115, sub-s. 3, and again by s. 115, sub-s. 7, in other cases, to protect the Army Council from any further claim, the true owner being left to his remedy against the payee, in case the latter fails in his duty, imposed on him by s. 113, sub-s. 4, of adjusting the amount received by him in due proportion among all those interested in the property.

Farwell J. in the court below took a crucially different view of the operation of those sections. He points out that sub-s. 4 of s. 113 deals with a form of impressment which is distinct from that covered by s. 115. That is perfectly true, but, in my judgment, the learned judge in construing the sections failed to give due effect to the words in s. 115, sub-s. 3, which apply the provisions of the Act as to provision or furnishing of carriages or animals under other sections of the Act to such provision under s. 115. The language is not happily chosen, but the court is, in my judgment, free, and indeed bound, to construe the Act ut res magis valeat quam pereat, and I feel bound to come to the conclusion that the intention of the legislature to assimilate the incidents of a requisition for purchase to those of a requisition for hiring sufficiently appears. Farwell J. found support for his view in s. 115, sub-s. 4, which seemed to him to be inconsistent with the importation of sub-s. 4 of s. 113 into s. 115. I must confess that for myself I am unable to appreciate the inconsistency, though I agree that where payment is made to a possessor who is not the owner the earlier part of s. 115, sub-s. 4, would seem to have no application. In my judgment, therefore, the appeal should be allowed, and, in lieu of the declaration made by Farwell J., there should be substituted a declaration that, as between the Army Council and the plaintiffs [the owners of the lorry], the payment made on October 26, 1939, by or on behalf of the Army Council to A. Hutchin (Haulage), Ld., is to be deemed to be payment to the owners, subject and without prejudice to such right as the owners may have to enforce against A. Hutchin (Haulage), Ld., the duty of adjusting the said amount in due proportion among all others interested in the article in respect of which the payment was made.

DU PARCQ L.J. I have had the advantage of reading the judgment of Clauson L.J., with whose conclusions and reasoning I agree, and I have little to add.

Although s. 113, read by itself, appears to deal only with impressment for the temporary purposes of a route, it is necessary as a matter of construction to read into it the provisions of sch. VI. which it incorporates. This schedule introduces a reference to requisitions for purchase. This somewhat surprising interpolation is explained when the reader of the Act is apprized by s. 115, sub-s. 3, that all the provisions of the Act which relate to impressment for hire are also to apply to requisitions of emergency. Unless ss. 113 and 115 are to be read together in the sense contended for on behalf of the Crown, it is impossible to account for the presence in sch. VI. of the words to which I have referred.

When once it is seen that s. 113, sub-s. 4, must be read as referring to requisitions of emergency, it is I think reasonably plain that the words "where it is not otherwise declared at "the time," whatever meaning is to be attached to them, do not qualify the later words which immediately follow the interposed conjunction "and". In my opinion, any doubt which there might be about the construction is removed by the next sentence. A duty is imposed on the possessor, if he is not the owner or is only a part-owner, to pay to the owner the whole purchase price or to pay a due proportion of the purchase price to the other part-owner or part-owners. This provision seems to me clearly to contemplate that in the regular course of events payment will be made to the possessor, even though it may be known to the Army Council's representative that the possessor is not the owner. In any but a very exceptional case the owner is adequately protected (1.) by the right which the statute impliedly confers on him to recover the purchase price from the possessor who has received it, as money had and received to the owner's use; (2.) by the fact that the possessor, if he fraudulently converts the money which he receives to his own use, will be guilty of an offence under s. 20 of the Larceny Act, 1916. The documents in this case show that it is the practice to call the attention of the payee to his duty in clear language, and when this has been done it is not likely that a possessor who has used the money for his own purposes will find it easy to escape a conviction. I must add that nothing I say is intended to refer to those who received the money in this case. They are not before the court and may, for all I know, have a complete defence to any claim or charge which may be brought against them.

Although I feel reasonably satisfied with the solution of the immediate problem at which this court has arrived, I share the view in which counsel on both sides concurred that the sections which we have had to consider are unnecessarily obscure, and, indeed, in some particulars unintelligible. For instance, I feel some doubt, which has been expressed, as to the meaning of the words "where it is not otherwise declared "at the time." It is obviously regrettable that the relations of the Crown and its subjects should be regulated by an enactment drafted in language which neither lawyers nor laymen can understand, and it is to be hoped that future amendments will give simpler expression to the intentions of the legislature. I agree that the appeal should be allowed.

LORD GREENE M.R. I have had the advantage of reading the judgments just delivered by Clauson and du Parcq L.JJ. I agree with them and only find it necessary to refer to one or two points by way of supplement to what they have said.

Sub-section 4 of s. 113 of the Army Act, which is the sub-section under consideration, made its first appearance in 1925 when it was inserted by the Army and Air Force (Annual) Act of that year. In that Act an attempt was made to improve the existing legislation both in form and in substance, an attempt which so far as clarity is concerned fell lamentably short of success. I share the hope expressed by du Parcq L.J. that the legislature will direct its attention to the matter. The sub-section was obviously added to get over what must have been a serious practical difficulty in operating the machinery of impressment. Before 1925 it is open to doubt whether dealings in connection with impressment could take

C. A.
1941
ROADWAYS TRANSPORT DEVELOPMENT, LD. v. ATTORNEY GENERAL.

Lord Greene M.R.

place with anyone but an owner or his authorized representative. In the matter of payment it seems as though it was to the owner that payment had to be made in all cases. Be that as it may, it is clear that, as impressment must in many cases be a matter requiring immediate and effective action, it was highly inconvenient to have to deal with an owner who might be at the other end of the country or even abroad at the time. In these circumstances, it would not have been surprising to find a provision to the effect that the possessor should for all purposes connected with impressment (including payment) be deemed to be the owner, leaving the apportionment of the sum received to be adjusted by the possessor as between himself and the owner subject to the appropriate sanctions. The whole difficulty in the present case arises by reason of the fact that the words "where it is not otherwise declared "at the time" are inserted. I share the views of my brethren as to the obscurity of these words. I may point out one further obscurity. What is meant by the words "at the time"? The process of impressment goes through many stages. There are by way of preliminaries the furnishing of lists of horses under s. 114, sub-s. 1 (*a*), and the preparation of lists of persons liable to furnish carriages and animals under s. 114, sub-s. 2. There is the justices' warrant followed by the constable's order, and so forth. To what stage do the words refer? Sub-section 8 of s. 115 may be referred to in this connection. That gives a power of seizure where "any person ordered" to furnish an article refuses or neglects to do so, but "the "said person" is nevertheless entitled to payment. If the order is directed to the possessor, no declaration as to ownership having been made, and the goods are seized and it is subsequently declared that someone else is the owner, to whom is payment to be made, to "the said person" or the owner? If it were necessary to hold that the words "where it is not otherwise "declared at the time" applied to payment, I should be disposed to say that the declaration must be made at any rate at the time when the constable's order is made out or served, that being the first effective step in the impressment of an article. In the present case the declaration was made

C. A.
1941
ROADWAYS TRANSPORT DEVELOPMENT, LD.
v.
ATTORNEY GENERAL.

at a much later stage. The appeal will be allowed and the declaration will be in the form stated by Clauson L.J.

Appeal allowed.

Solicitor for the appellant: *Treasury Solicitor.*
Solicitors for the respondents: *Kimber, Bull & Co.*

P. J. B.

WILLIAMS-ASHMAN *v.* PRICE AND WILLIAMS AND ANOTHER.

BENNETT J.
1941
Oct. 22, 23, 24;
Dec. 19.

Trust—Breach—Liability of agent of trustees.

An agent of trustees in possession of money which he knows to be trust money is not accountable, in the event of a breach of trust, to the beneficiaries interested in that money so long as he has acted honestly and has not intermeddled in the trust by doing acts characteristic of a trustee and outside the duties of an agent.

Barnes v. *Addy* (1874) L. R. 9 Ch. 244 and *Mara* v. *Browne* [1896] 1 Ch. 199 applied.

Blyth v. *Fladgate* [1891] 1 Ch. 337 distinguished.

ACTION.

By a deed dated October 1, 1927, and made between the Rev. William Stewart MacGowan (hereinafter called Dr. MacGowan), Walter George Kent and Alfred Holland (therein described as "the settlors"), of the one part, and Dr. MacGowan and Edward Streather (therein described as "the "trustees"), of the other part, which recited that a sum of 965*l.* 1*s.* 8*d.* was standing to the credit of the settlors in the Westminster Bank, High Holborn, London, the settlors directed and the trustees declared and agreed with the settlors that the trustees should stand possessed of the said sum upon trust to invest the same in the names of the trustees upon securities authorized for the investment of trust funds and to pay the income to the incumbent for the time being of the church of Holy Trinity, Kingsway, London. Out of the settled fund the trustees invested 900*l.* on a mortgage by Miss Pullen

BENNETT J.
1941
WILLIAMS-ASHMAN
v.
PRICE & WILLIAMS.

of freehold property at Southend-on-Sea. The whole of the business connected with the declaration of trust and investment was carried out by the first defendants, a firm of solicitors, consisting at the date of the issue of the writ of Alfred Williams and his son Leslie Williams, assisted by the defendant Fred Syme Franklin, a managing clerk in the employment of the firm, who was a friend of Dr. MacGowan, who was then vicar of Holy Trinity, and a member of his congregation. Of the balance of 65*l.* 1*s.* 8*d.*, the sum of 23*l.* 10*s.* was paid by the settlors to the defendant firm for costs, and 41*l.* 11*s.* 8*d.* was paid to Franklin and a Mr. Brown who were the churchwardens of the parish, to be used for parochial purposes. In 1936 Franklin was asked by Dr. MacGowan to arrange for the repayment of 200*l.* out of the 900*l.* lent on mortgage, and on June 24, 1936, that sum was paid by Miss Pullen to the firm. Dr. MacGowan informed the firm that he required it to pay the cost of structural repairs to the vicarage which amounted to 300*l.*, the remaining 100*l.* being paid by himself. On August 18, 1936, a cheque was drawn by the firm in favour of Dr. MacGowan and sent to him. He then drew a cheque of his own for 200*l.* and sent it to Franklin, who invested that sum at Dr. MacGowan's request in the purchase of 200 six per cent. preference shares of 1*l.* each in the Regional Investment and Development Company, Ld., of which Franklin was a director, an unauthorized investment. The shares were allotted to Dr. MacGowan. Streather died on November 26, 1936, leaving Dr. MacGowan the sole trustee of the declaration of trust. On April 14, 1937, on instructions given to him by Dr. MacGowan, Alfred Williams gave written notice to the mortgagor to pay off the balance of 700*l.* of the mortgage debt. The money was received by the firm on Dr. MacGowan's behalf on June 29, 1937. On further instructions by Dr. MacGowan, 300*l.* was paid by the firm to Andrew MacGowan, his son, and then 200*l.* was invested in preference shares of the Regional Investment and Development Company, Ld., and at a later date the balance of 200*l.* was invested in Dr. MacGowan's name in the same company. Dr. MacGowan died intestate on July 6, 1939. On October 13,

BENNETT J.
1941
WILLIAMS-ASHMAN
v.
PRICE
&
WILLIAMS.

1939, Alfred Williams found in the firm's safe the declaration of trust of October 1, 1927, and wrote to one of the churchwardens of the parish suggesting that Messrs. Waterhouse & Co., the solicitors acting for the administrators of Dr. MacGowan's estate, should be communicated with on the matter. As a result of inquiries and correspondence this action was brought by the plaintiff, the present incumbent of Holy Trinity, Kingsway, claiming that the defendants were liable to make good any deficiency in the 900*l.* which resulted from applications and reinvestments of that sum in breach of the trusts declared by the deed of October 1, 1927, and asking for the usual directions, accounts and inquiries. This report is confined to the question whether the defendants were liable to the plaintiff as constructive trustees for breach of trust in calling in the 900*l.* lent on mortgage and reinvesting it, or allowing it to be reinvested, in the shares of the Regional company.

Harman K.C. and *Winterbotham* for the plaintiff. The defendants have been guilty of a breach of trust. The money paid by the mortgagor, which they knew to be trust money, was received by the defendants and paid to their client or his order, and they were aware of the reinvestment of 600*l.* in an unauthorized investment, in the name of Dr. MacGowan, and of the loan of 300*l.* to his son. A solicitor can only discharge himself by applying trust money in accordance with the terms of the trust. He does not get a discharge by paying it to one trustee only, who invests it in unauthorized securities: *Lee* v. *Sankey* (1). If trust funds get into the hands of persons who have notice of the trust and they misapply them, they are liable to the beneficiaries as constructive trustees: *Morgan* v. *Stephens* (2); *Blyth* v. *Fladgate* (3); Underhill on Trusts, 9th ed., p. 548.

Vaisey K.C. and *Raymond Jennings* for the defendant firm. Although Dr. MacGowan was clearly guilty of a breach of trust, the defendant firm are not liable as constructive trustees.

---

(1) (1873) L. R. 15 Eq. 204.
(2) (1861) 3 Giff. 226.
(3) [1891] 1 Ch. 337.

As to the 200*l.* paid off and received in 1936, a different case is made against the defendants Williams and Franklin respectively. The firm merely acted as agents for the trustees in what they did as in *Mara* v. *Browne* (1). *Blyth* v. *Fladgate* (2) is distinguishable from the present case. There the solicitors had exercised independent authority before the appointment of the trustees, but here the defendant firm did not intermeddle with the trust funds in any way, or exercise any independent judgment. They merely carried out their instructions. It is not the knowledge that the moneys dealt with are trust moneys that fixes the person who handles them with liability, but the knowledge that they are being dealt with in breach of trust, and there is no evidence that the defendants knew the terms of the trust when they paid the money to Dr. MacGowan: see *Barnes* v. *Addy* (3). The money was subject to a charitable trust, and should have been paid to the Ecclesiastical Commissioners in augmentation of the living.

The action to be maintainable should properly have been brought by the Attorney-General, or the duly appointed trustees of the property.

Cur. adv. vult.

Dec. 19. BENNETT J. read a judgment in which, dealing with the material point, he said: Before considering the claim, there are a few further matters of fact which must be stated. First, the defendant, Leslie J. Williams, had nothing whatever to do with any of the transactions complained of. He did not become a partner in the defendant firm until May, 1936. Next, as regards Mr. Alfred Williams and Mr. Franklin, no charge of bad faith was made against either of them. I saw them both in the witness box and came to the conclusion that each of them was an honest man and was trying to tell me the truth to the best of his recollection about the transactions which were being inquired into. I came to the conclusion that neither Mr. Williams nor Mr. Franklin was conscious of the fact that either Dr. MacGowan or Mr. Streather was committing a breach of trust. I feel sure that neither of them was assisting Dr. MacGowan or Mr. Streather to commit a breach of trust. Both of these defendants knew that the money which was lent to Miss Pullen was trust money. Mr. Alfred Williams at one time undoubtedly knew what the trusts were. Mr. Franklin said that he never knew exactly what the terms of the trusts were. I feel sure that in 1936 and 1937 neither Mr. Alfred Williams nor Mr. Franklin remembered what the terms of the trust were. They might easily have ascertained them, but neither took any steps to do so.

---

(1) [1896] 1 Ch. 199.
(2) [1891] 1 Ch. 337.
(3) (1874) L. R. 9 Ch. 244.

The plaintiff alleges in para. 7 of the statement of claim that the sum of 200*l.* paid by the defendant firm to Dr. MacGowan on August 18, 1936, was, by arrangement between Dr. MacGowan and the firm, repaid by Dr. MacGowan to Mr. Franklin to be invested in the Regional company. The evidence of Mr. Alfred Williams and Mr. Franklin has satisfied me that there never was any such arrangement between Dr. MacGowan and the firm, but that the investment was made by Dr. MacGowan as the result of talks between himself and Mr. Franklin in which Mr. Alfred Williams took no part and of which he knew nothing. Moreover, the investment was made at Dr. MacGowan's own request and not as a result of pressure put on him by Mr. Franklin or requests made to him by Mr. Franklin. I have no ground for thinking that in regard to these investments Mr. Franklin was dealing otherwise than honestly and fairly with Dr. MacGowan.

I will now consider the claims made by the plaintiff against the defendants respectively. The basis of all of them seems to be that in some way or another the defendants have made themselves accountable to the plaintiff as a beneficiary under the declaration of trust, either because they had in their hands money subject to the declaration of trust or because they had made themselves liable for breaches of trust as constructive trustees.

[His Lordship dealt with and dismissed the claims in respect of the balance of 65*l.* 1*s.* 8*d.*, which does not call for report, and continued :] There now remains for determination the plaintiff's claim in respect of the balance of the trust fund, namely, the sum of 900*l.* lent to Miss Pullen. Of this sum, 200*l.* came into possession of the firm on behalf of the trustees in August of 1936 in the manner I have stated. The plaintiff seeks to make Mr. Franklin as well as the firm liable in respect of it, and I will first deal with the claim against Mr. Franklin.

The ground upon which the plaintiff sought at the Bar to establish Mr. Franklin's liability was that when he received Dr. MacGowan's cheque for 200*l.* he knew that he was receiving trust money subject to the declaration of trust and so became constructively a trustee of that sum for the persons beneficially interested in the trust fund of which it was part.

This contention breaks down on the facts. Mr. Franklin has said in evidence (and I accept it) that whilst he knew that Pullen's mortgage was a mortgage vested in Dr. MacGowan and Mr. Streather as trustees, he did not at any time know what the trusts were. He said that he had been told by Dr. MacGowan that he had utilised money of his own in paying for structural repairs executed at No. 2 Gate Street. I have no grounds for disbelieving this statement. The question is not whether the doctor's statement was true but whether the doctor made it and whether Mr. Franklin believed it to be true. I accept Mr. Franklin's evidence that he believed the doctor's statement. The effect of Mr. Franklin's evidence is that when he received Dr. MacGowan's cheque for 200*l.* with a request to invest it in the Regional company's shares he believed that he was receiving the doctor's money. He, therefore, never became a constructive trustee of the money, and the claim against him must fail.

The case of the plaintiff against the firm was, if I rightly understood the arguments, put in two ways. The first contention was that the firm called the money in on the instructions of Dr. MacGowan alone and got possession of it as a consequence of those instructions. They then paid it over to Dr. MacGowan alone and so never got a good discharge from the two persons entitled to the money, namely, Dr. MacGowan and Mr. Streather.

In support of this contention the decision of Bacon V.-C. in

Lee v. *Sankey* (1) was relied on. The instructions to call in the money did come from Dr. MacGowan alone, but I do not see the relevance of this fact or its bearing on the liability of the defendant firm. The firm undoubtedly got the money into their possession. The question is whether the proper inference to be drawn from the documents is that the firm paid the 200*l*. to Dr. MacGowan with the authority of Mr. Streather. I draw the inference from these documents that it was so paid, and, therefore, in my judgment the contention founded on *Lee* v. *Sankey* (1) fails.

The second contention put forward on behalf of the plaintiff in respect of this sum and also with respect to the 700*l*., which was the balance of the mortgage debt, was that both these sums came into the possession of the defendant firm with knowledge acquired through Mr. Alfred Williams that they were trust moneys, and, therefore, that the firm owed a duty to the persons beneficially interested in the moneys to see that the moneys were dealt with in accordance with the trusts to which they were subject. It is clear that Mr. Alfred Williams knew that both sums of money were trust money. The question is whether that knowledge saddles either the firm or Mr. Alfred Williams with the responsibilities of a trustee. Does the knowledge of that fact give rise in equity to a duty to the persons beneficially interested in the trust money?

The defendant firm contend that the answer to that question is in the negative. Their answer is based partly on fact and partly on law. They say that Mr. Alfred Williams acted honestly, and was not a party to any breach of trust by the express trustees, and that they (the firm) received the money as agents for principals and dealt with it in accordance with the directions of their principals. On those facts the firm contend that as a matter of law they never came under any duty to the persons beneficially interested in the money. The line of difference between the parties seems to me to be very clearly marked. The plaintiff affirms that when an agent receives on behalf of a principal money which he knows to be

(1)) L. R. 15 Eq. 204.

BENNETT J.
1941
WILLIAMS-ASHMAN v. PRICE & WILLIAMS.

trust money, he becomes a constructive trustee of that money and can only discharge himself by showing that the money was duly applied in accordance with the trust. The defendant firm contend that in those circumstances, so long as he acts honestly, an agent owes no duty to anyone except his principal, and that he only becomes liable as a constructive trustee if he intermeddles in the trust by dealing with or disposing of the trust money without his principal's instructions.

The plaintiff's argument was based on a passage in Underhill's Law of Trusts and Trustees, 9th ed., p. 548, in these terms: "Where trust funds come into the custody and under the "control of a solicitor, or indeed of anyone else, with notice "of the trusts, he can only discharge himself of liability "by showing that the property was duly applied in accordance "with the trusts." The authority for this statement is a passage from the judgment of Stirling J. in *Blyth* v. *Fladgate* (1). In *Morgan* v. *Stephens* (2) Stuart V.-C. says: "If a trustee "employs an agent, so long as the acts done by the person so "employed are confined to mere agency on behalf of his "employer the trustee, generally speaking the agent cannot "be accountable as trustee. But where the agent obtains "possession of the trust funds and his acts are not in strict "conformity with his duty as agent, he ceases to be a mere "agent." Lord Selborne, in an oft cited passage from his judgment in *Barnes* v. *Addy* (3), says that the responsibility of a trustee "may no doubt be extended in equity to others "who are not properly trustees if they are found either making "themselves trustees de son tort, or actually participating in "any fraudulent conduct of the trustee to the injury of the "cestui que trust. But, on the other hand, strangers are not "to be made constructive trustees merely because they act "as the agents of trustees in transactions within their legal "powers, transactions perhaps of which a court of equity may "disapprove, unless those agents receive and become chargeable "with some part of the trust property or unless they assist with

---

(1) [1891] 1 Ch. 337.
(2) [1861] 3 Giff. 226, 236.
(3) L. R. 9 Ch. 244, 251.

"knowledge in a dishonest and fraudulent design on the part "of the trustees."

The authority which, I think, is decisive of the present case is *Mara* v. *Browne* (1), a decision of the Court of Appeal. There beneficiaries sought to make liable for breaches of trust two solicitors, Hugh Browne and Arthur Browne, who carried on business in partnership. The breaches of trust complained of were advances of trust money on eight mortgages suggested as securities by Hugh Browne which were alleged to be speculative, risky and not such as could be justified by a trustee. The moneys so advanced amounted to 9200*l.* and before they were advanced they came into the hands of Hugh Browne and were paid by him into his own bank account. He then made the advances to the respective mortgagors on the authority of persons purporting to act as trustees of the settlement. The judge at the trial came to the conclusion that the investments were not proper for trustees to make and were breaches of trust, and with this conclusion of fact the Court of Appeal agreed, but the court exonerated the solicitors from liability on the ground that they never became constructive trustees. I will read a passage from the judgment of A. L. Smith L.J. (2) which states the ground on which the decision went: "North J. "found, and I agree with him, that eight of the mortgages "taken for the trust funds were speculative and risky, and "not such as could be justified by a trustee—in fact, these "investments constituted breaches of trust. Although this "might well render the trustees liable for a breach of trust, it "certainly does not per se render their solicitor so liable. "But it is said that the facts show that there should be imputed to Hugh Browne the character of a trustee, or, in other "words, that he was a trustee de son tort, and upon this "ground the learned judge has held him liable. It is not "contended on behalf of the plaintiffs that Hugh Browne has "been guilty of any fraudulent or dishonest conduct to the injury "of the cestuis que trust, nor, to use Lord Langdale's words in "*Fyler* v. *Fyler* (3) did he, being a solicitor, 'take advantage

---

(1) [1896] 1 Ch. 199, 251.
(2) Ibid. 209.
(3) (1841) 3 Beav. 550, 560.

"' of his position to acquire a benefit for himself at the hazard, " ' if not to the prejudice, of the trust ' ; but it was said that "he had made himself a constructive trustee, which, so far "as I know, is the same thing as a trustee de son tort. Now, "what constitutes a trustee de son tort ? It appears to me "if one, not being a trustee and not having authority from a "trustee, takes upon himself to intermeddle with trust matters "or to do acts characteristic of the office of trustee, he may "thereby make himself what is called in law a trustee of his "own wrong—i.e., a trustee de son tort, or, as it is also "termed, a constructive trustee."

Mara v. *Browne* (1) seems to me to be a decision that an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent. After all, the beneficiaries have their remedy against the persons who are the real trustees. I have stated that, in my opinion, Mr. Alfred Williams acted throughout the transactions honestly. Indeed, the contrary is not suggested. He acted throughout on the instructions of his principals. He never intermeddled in the trust. He has, I think, acted incautiously. Many people might take the view that he ought to have ascertained by reference to the declaration of trust what the trusts were before he did what he was asked to do first by Dr. MacGowan and Mr. Streather and afterwards, when Mr. Streather had died, by Dr. MacGowan alone. But considerations of this kind do not assist the plaintiff unless he can establish that when the money came into the possession of the firm, Mr. Alfred Williams or the firm came under a duty to him as a beneficiary interested in the trust fund. It is only if the plaintiff can establish the existence of such a duty that he can establish a liability on the firm arising out of the breaches of trust committed by the express trustees.

The plaintiff is, I think, trying to use the passage from Stirling J.'s judgment and the statement from Underhill's

(1) [1896] 1 Ch. 199.

BENNETT
J.
1941
WILLIAMS-
ASHMAN
v.
PRICE
&
WILLIAMS.

Law of Trusts and Trustees to support a proposition which neither Stirling J. nor the late Sir Arthur Underhill could have had in mind when they used the words relied on.

Blyth v. *Fladgate* (1) was plainly a case where the defendants, a firm of solicitors, were saddled with the liability of trustees because they had dealt with trust moneys in breach of trust and without instructions from their principals. The facts were that at a time when there was but one trustee of a marriage settlement, trust moneys had been invested in exchequer bills which had been deposited with the bankers of the solicitors and were so deposited when the sole trustee died. Afterwards, while there was no trustee, the bills were sold and the proceeds of sale were placed to the credit of the solicitors with their bankers and afterwards paid by the solicitors to a mortgagor who, as security for their repayment, executed a mortgage in favour of three persons who were subsequently appointed to be trustees of the settlement. The advance on this mortgage was held improper and a breach of trust, and for this breach the solicitors were held to be responsible as constructive trustees because, having in their possession money which they knew was trust money, they had made an improper investment of it without instructions from or the authority of any principal. Stirling J.'s observations must be read in relation to the facts with which he was dealing. In *Mara* v. *Browne* (2) the Court of Appeal laid down clearly the principles which govern the rights of the plaintiff and defendant firm in respect of the two sums of 200*l.* and 700*l.* received by the firm from Miss Pullen. On the facts, as I find them to be, the firm is not responsible to the plaintiff for the breaches of trust committed by the express trustees of the declaration of trust in respect of these two sums. The result is that the action fails and must be dismissed with costs.

Judgment for defendants.

Solicitors: *Waterhouse & Co.*; *Price & Williams.*

(1) [1891] 1 Ch. 337.

(2) [1896] 1 Ch. 199.

H. L. L.

C. A.

BENNETT J.

1941

Dec. 1, 3, 4.

C. A.

1942

Jan. 19.

In re EZEKIEL'S SETTLEMENT TRUSTS.

NATIONAL PROVINCIAL BANK, LIMITED *v.* HYAM.

Trust—Trustees—Settlement of difference relating to trust—Sanction by court—Infant beneficiaries—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 15 (*f*).

D. E., having covenanted in 1932 in consideration of the proposed marriage of his daughter to settle a certain sum in her favour and that of her husband and children, failed to do so, and in 1939 the persons intended to benefit, including two infant children of the marriage, brought an action against him to enforce the covenant and obtained judgment, the order of the court providing for payment of the sum in question to trustees when they had been appointed. The N. P. Bank having been appointed, negotiated with D. E., who had not satisfied the judgment, and reached a compromise of the claim against him. On a summons taken out by the trustees seeking the sanction of the court thereto, the husband, the wife and the guardian ad litem of the infants, the respondents to the summons, opposed the compromise, but the judge, being of opinion that its terms were for the benefit of the infants, approved it. On a motion to set aside his order :—

Held, that the court had jurisdiction to exercise the discretion on behalf of the trustees and to sanction the compromise.

The court, when assisting trustees in such a case, pays full attention to the views put before it on behalf of beneficiaries, but, in essence, it is deciding what the trustees ought to do having regard to the interests of everybody concerned, including those of infants with regard to which the court is not only entitled but bound to make up its own mind.

Decision of Bennett J. affirmed.

MOTION.

On October 20, 1932, David Ezekiel (hereinafter called "the father-in-law"), in consideration of a marriage contemplated between his daughter, Rachel (hereinafter called "the wife"), and Isaac Joseph Hyam (hereinafter called "the "husband"), executed a deed whereby he covenanted to transfer to trustees securities to the value of two lakhs of rupees (equivalent to about 15,000*l.*) to be held on trust for the wife for life and after her death for the husband for life, if he should survive her, and after the death of the survivor for their children. The parties to the deed were the father-in-law, the husband and the wife. The marriage took place and there were two children, Joseph and Michael (hereinafter called "the infant children"). In 1939, the husband, the wife and the infant children began an action in the Chancery Division for specific performance of the covenant which had not been carried out by the father-in-law. He was then in Belgium and did not appear, and on July 28, 1939, it was ordered that he should pay 15,000*l.* and certain interest into court and that on the appointment of proper persons as trustees this sum should be held by them on the trusts of the settlement. The plaintiffs were given liberty to apply, when trustees had been appointed, for an order that the sum to be lodged in court should be paid to them direct. On February 27, 1940, the National Provincial Bank, Ld., were appointed trustees. When the Germans invaded Belgium in May, 1940, the father-in-law came to England and, to compel him to comply with the order of the court, a bankruptcy notice was served on him and a bankruptcy petition was presented. Negotiations for a settlement of the claim were conducted and it became apparent that the trustees might be involved in litigation the costs of which, if they were unsuccessful, they might be ordered to pay. On November 14, 1940, they took out a summons asking for directions whether they as trustees "should compromise or attempt to reach a compromise "of the liability of David Ezekiel" under the settlement. The husband, the wife and the infant children were respondents, Sarah Hyam, sister of the husband, being the guardian ad litem of the children. On January 20, 1941, an agreement was reached between the trustees and the father-in-law, and the summons was amended to ask the court to sanction it. The respondents resisted the application and the opinion of counsel was taken on behalf of the infant children. He expressed himself with considerable hesitation, but reached the conclusion that the compromise was in their interests. On June 20, 1941, Farwell J., being of opinion that the compromise was for the benefit of the infant children, approved it and ordered it to be carried into effect. The husband having moved to set aside this order, Bennett J. referred the matter to the Official Solicitor for a report whether the compromise was for the benefit of the infant children. On November 13, 1941, the Official Solicitor reported that it was for their benefit.

The husband in person. The court had no jurisdiction to sanction the compromise because it was not acceptable to the guardian ad litem. Before any compromise can be made the opinion of the guardian should be taken, and, if he opposes and his opposition cannot be shown to be improper, the court cannot sanction the proposal. [He referred to *In re Birchall* (1), *Brooke* v. *Lord Mostyn* (2) and *Micholls* v. *Corbett* (3).] The court attaches importance to the fact that the guardian is a member of the family.

Lightman for the trustees. The court is only asked to exercise on behalf of the trustees the power to settle a difference relating to the trust which was conferred on them by s. 15 (*f*) of the Trustee Act, 1925. Accordingly, the opposition of the guardian ad litem is irrelevant. [He referred to R. S. C., Order XXII., r. 14, and *Norton* v. *Steinkopf* (4).]

Bennett J. [having stated the facts:] Mr. Hyam has objected that, if the compromise is unacceptable to himself and his wife and to the guardian ad litem of the infants, the court has no jurisdiction to sanction it, and in support of that argument he relies on *In re Birchall* (1). That case, however, seems to me to have nothing to do with the question which I have to decide. Infants were litigating, and Malins V.-C. had forced a compromise of that litigation on them against the views of their counsel and the wishes of their guardian, and the Court of Appeal held that it was not permissible to force a compromise on infant litigants in those circumstances. In the present case I am not forcing a compromise on parties to litigation before me. The trustees, under s. 15 (*f*) of the Trustee Act, 1925, have power to "compromise, compound, abandon, "submit to arbitration, or otherwise settle" any difference relating to the trust. They could have entered into the

(1) (1880) 16 Ch. D. 41.
(2) (1864) 33 Beav. 457.
(3) (1865) 34 Beav. 376.
(4) (1853) Kay, 45.

agreement which the court is asked to approve without coming to the court at all, but in the circumstances they have surrendered to the court their own discretion in the matter and are asking the court to exercise it on their behalf. All that I am asked to do, therefore, is to exercise, on behalf of the trustees, the discretion which the legislature has given to them. Having considered all the circumstances, including the opinion of counsel which was obtained by the guardian ad litem of the infants and the report of the Official Solicitor, I have come to the conclusion that it is for the benefit of the infants that the agreement should be approved, and for these reasons I see no ground for acceding to the application to set aside the order made by Farwell J.

The husband appealed. F. C.

The husband in person. The court has no authority or jurisdiction to bind my interest. In the court below no reference was made to *Norton* v. *Steinkopf* (1) which I cited. The headnote contains the statement: "If adult cestuis que "trust insist upon their strict rights, the court will not exercise "any discretion for the benefit of other cestuis que trust who "are infants." That exactly applies to this case, and this appeal should be allowed. [LORD GREENE M.R. We are all agreed that the jurisdiction of the court is manifest. Do you contend that it was exercised on some wrong principle?] I do. The views of the guardian ad litem and myself were disregarded, and that is a course which it is not open to the court to take.

Lightman for the trustees was not called on.

LORD GREENE M.R. This appeal is by Mr. Hyam in his personal capacity. He is the only appellant, and the only question before us is whether at his instance the order which has been made ought to be upset. His wife and the two infants are respondents to the appeal, but they have not appeared. He tells us that his wife and the guardian ad litem take the same view as he does, and, indeed, that is what one would expect having regard to the attitude which was taken up below.

---

(1) Kay, 45.

There can be no question, to my mind, of the jurisdiction of the court to sanction a compromise such as is in question here. All that the court was being asked to do was to exercise the discretion given to the trustees by s. 15 of the Trustee Act, 1925, and to direct them whether or not they should proceed with the compromise. The court has ample jurisdiction, and, of course, in exercising that jurisdiction, the court, as any properly acting trustee would do, pays due attention to the wishes of the beneficiaries. It is quite a mistake to suppose that the court is bound to follow the wishes of this beneficiary or that beneficiary, particularly in a case like the present, where certain beneficiaries are obviously, and perhaps not unnaturally, anxious for litigation in the hopes of getting something better than the compromise will give them. In the present case, however, the court is confronted with the circumstance that the difficulties of recovering more are obviously great. Whether they are insurmountable or not nobody can tell. That could be shown only by putting the matter to the proof and rejecting the compromise. The court has to act, in just the same way as has any trustee, on the balance of possibilities and apparent advantages. In the present case the court has to remember that there is no fund out of which the trustees could properly get any indemnity for their costs, and, further, that to reject the compromise and proceed with the difficult and clearly expensive litigation which would be necessary would mean that the certainty of getting the 7500*l.* might be lost for no good purpose. The court, therefore, when assisting trustees in a case of this kind, listens and pays full attention to the views put before it on behalf of the beneficiaries, but, in essence, it is deciding what the trustees ought to do having regard to the interests of everybody concerned, including those of infants with regard to which the court is not only entitled, but bound to make up its own mind. In the present case the court has come to the conclusion that the infants will be benefited by this compromise. That being so, the trustees are authorized to proceed with it and it is quite impossible in these circumstances for this court, at the instance of the appellant, to interfere with the exercise of a discretion which exists in law and has not been exercised in disregard of any principle or so as to produce any apparent real injustice. In the circumstances, therefore, the appeal must be dismissed with costs.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree.

Solicitors: *Nash, Field & Co.*

K. R. A. H.

In re V. G. M. HOLDINGS, LIMITED.

C. A.
1942
Jan. 12, 13, 14, 15, 16, 21.

Company—Share—Allotment—Financial assistance for payment given by company—" Purchase "—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 45, *sub-s.* 1*—Director—Misfeasance—Acquisition of valueless shares in other company—Order.*

By s. 45, sub-s. 1, of the Companies Act, 1929, " it shall not be " lawful for a company to give . . . . any financial assistance " . . . . in connection with a purchase made . . . . by any " person of any shares in the company . . . ."

The acquisition of shares in a company by application and allotment is not a " purchase " within the sub-section, which, accordingly, does not cover a transaction by which a company provides money to assist a subscription for its own shares.

Order made on a summons against the director of a company for misfeasance and breach of trust in relation to a payment made by the company to acquire valueless shares in another company.

APPEAL from Bennett J.

V. G. M. Holdings, Ld. (hereinafter called " V. G. M."), was a private company incorporated on April 22, 1938, with a nominal capital of 20,000*l.* divided into 20,000 shares of 1*l.* each, all of which, at a board meeting held on May 4,

C. A.
1942
V. G. M. HOLDINGS, LD., *In re.*

1938, were allotted for cash to the sole directors of the company as follows: to Charles Vivian Vanbergen, 10,100, to Malcolm Glass, 4950, and to John Miller, 4950. It was resolved at the meeting that a call of 16*s.* a share be made on all the shares and it was further resolved that the secretary be authorized to make arrangements for V. G. M. to acquire the share capital of Century Refrigeration Co., Ld. (hereinafter called "Century"), the directors of which were the same as those of V. G. M. All the shares in Century were owned beneficially by Vanbergen. On May 20, 1938, V. G. M. paid to Century a sum of 15,980*l.* by cheque, and on the same day Century drew a cheque in favour of Vanbergen for 8080*l.* and cheques in favour of Glass and Miller for 3960*l.* each. They all immediately endorsed and transferred the respective cheques to V. G. M. and the sums were credited to them in its books as payments of 16*s.* a share on their holdings. On October 20, 1938, Century went into voluntary liquidation, and on November 20, 1939, an order was made for the compulsory winding up of V. G. M. On December 30, 1940, the liquidator of V. G. M. took out a summons, to which Vanbergen was the sole respondent, alleging that the payment of 15,980*l.* to Century was made fraudulently and in breach of trust and also in breach of the provisions of s. 45 of the Companies Act, 1929, and asking for (*a*) a declaration that Vanbergen was liable to contribute that sum to the assets of the company as compensation for his misfeasance and breach of trust in making the payment or procuring or permitting it to be made and (*b*) an order that he should pay it. Bennett J. held that a case of fraud had been made out; that the cheques in question were not drawn bona fide in pursuance of any business transaction; that the acquisition of a share from a limited company by application and allotment was a purchase of the share; and that, accordingly, Vanbergen had been a party to an act in breach of the provisions of s. 45, sub-s. 1, of the Act and was liable to repay 15,980*l.* Vanbergen appealed.

Wallington K.C. and *Heckscher* for Vanbergen. When a person subscribes for shares he does not purchase anything. He only contributes to the capital of the company, becoming a member who is merely entitled in a winding-up to be repaid the nominal value of his shares out of the surplus assets remaining after the creditors have been paid in full. When, therefore, a company lends money which is applied in subscribing for its shares there is no breach of s. 45, sub-s. 1, of the Companies Act, 1929. A contributor's rights under the Act are very different from those of a purchaser of property. A company allots its shares and does not sell them. Indeed, at the moment of its incorporation it has nothing to sell. It has to get together in capital money sufficient to enable it to acquire and carry on a business. The directors were not guilty of an illegal transaction. Further, on the evidence there was no misfeasance. Vanbergen honestly thought that the shares in Century were worth what was paid for them. He was neither reckless nor dishonest. [They referred to *Salomon* v. *A. Salomon & Co., Ld.* (1) and *Parker & Cooper, Ld.* v. *Reading* (2).]

Wynn Parry K.C. and *Raymond Jennings* for the liquidator. Allotment of a share in a limited company is the same thing as purchase: see *Oriental Inland Steam Co., Ld.* v. *Briggs* (3). The issue of a share to a subscriber for cash implies that the company has something to sell. A share before issue is an existing article of property attached to which are rights which are purchased when it is acquired by subscripiton. The issue of a share is not an act of creation, but is the dealing with something which already exists. A company cannot purchase its own shares: *Trevor* v. *Whitworth* (4); and under s. 45, sub-s. 1, of the Act it cannot give financial assistance in connection with "a purchase" of its shares. There can be no legitimate distinction between a transaction in which a company provides money for the purchase of shares already issued and one in which it provides money for the acquisition of its shares by application and allotment. Each transaction is a "purchase." In any event, Vanbergen

(1) [1897] A. C. 22, 33.
(2) [1926] Ch. 975, 983.
(3) (1861) 4 De G. F. & J. 191, 196, 197.
(4) (1887) 12 A. C. 409.

C. A.
1942
V. G. M. Holdings, Ld., *In re.*

is liable for misfeasance as he knew that Century was insolvent and its shares valueless.

Heckscher in reply.

Lord Greene M.R.

Jan. 16. LORD GREENE M.R. said that the evidence indicated that the cheque was drawn and handed over in pursuance of a real transaction. That payment of 15,980*l.* to Century was made, as to 8301*l.* 12*s.* 3*d.* to it as agent for Vanbergen by way of payment of the consideration for the transfer to V. G. M. of the beneficial ownership of the whole of its issued share capital, and as to 7678*l.* 7*s.* 9*d.* by way of loan to it to enable it to discharge an indebtedness to its directors. The result of the whole transaction was that the liability of the directors to pay up the call of 16*s.* a share was satisfied and thereafter what represented the value of the call to V. G. M. was (*a*) the shares in Century and (*b*) the debt owing to it by Century. The transaction was a fraud on V. G. M. since Century was completely insolvent and its shares were of no value. He would say nothing about Glass and Miller, who were not parties to the litigation, but so far as Vanbergen was concerned a purely fictitious value was put on Century's shares and a purely fictitious assumption was made as to its credit. His lordship continued: It is established to my satisfaction that Mr. Vanbergen was guilty of misfeasance as a director of V. G. M. in procuring that company to buy the shares from himself on a fraudulent over-value and to make an unsecured loan to Century in order to provide himself and his co-directors with an apparent sum of cash or credit by which they could satisfy an obligation which was the property and existed for the benefit of V. G. M., to wit, the obligation of the three of them in respect of the calls on their shares. To the question what is the loss which the company has suffered as the result of that misfeasance and what the proper order ought to be I will refer in a moment. That being the conclusion to which I have come, it would be sufficient to dispose of the appeal, but, although the learned judge found that the cheque of 15,980*l.* was not drawn with reference to any real transaction at all, and was, accordingly, a mere giving away of V. G. M.'s money, and a case of fraud therefore was made out against Mr. Vanbergen, he did not make a declaration or grant any relief based on that part of the case, because he had come to the conclusion that the case fell within s. 45, sub-s. 1, of the Companies Act, 1929. That sub-section provides that, subject to certain exceptions with which I need not deal "it shall not be lawful for a company "to give, whether directly or indirectly, and whether by "means of a loan, guarantee, the provision of security or "otherwise, any financial assistance for the purpose of or in "connection with a purchase made or to be made by any "person of any shares in the company." There is a penalty of 100*l.* in case of contravention.

Those whose memories enable them to recall what had been happening after the last war for several years will remember that a very common form of transaction in connection with companies was one by which persons—call them financiers, speculators, or what you will—finding a company with a substantial cash balance or easily realizable assets such as war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realization of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not illegitimate to bear in mind that notorious practice in considering the ambit of the section. I do not mean by this that, if the language of the section is wide enough to extend beyond transactions of that general character, that would afford any ground for cutting the language down. The only use which I think it is legitimate to make of it is that the existence of this very questionable practice affords a reason for the word "purchase" in the section. If, as a matter of construction, "purchase" extends to cases such as the present where the money is used not in connection with the purchase of the company's shares but in connection with the subscription for the company's shares, that construction must be put on the language.

The sole question is whether or not the word "purchase" in this section covers a case where the money which the company provides is used to assist a subscription for the company's own shares. There could, I think, be no doubt that, if that question were answered in favour of the liquidator, the 15,980*l.* was provided by the company by way of financial assistance, because whether a company provides the money by way of gift or by way of loan or by buying assets from the person who is purchasing the shares at a fraudulent over-value, all those transactions, it seems to me, would fall within the phrase "financial assistance." I, therefore, feel no difficulty about that, but, with all respect to Bennett J., I am unable to agree with the view which he took that the subscription by these three directors for shares in V. G. M. was, within the meaning of the section, a purchase of those shares. In the first place, throughout the whole of the Companies Act, 1929, the language which is used with regard to the issue of shares to subscribers is invariably confined to words like "issue," "subscription," "application," "allotment," and so forth. There is not a single passage in the Act to which we were referred, or to which my fairly complete recollection of the Act goes, in which the word "purchase" is used in relation to the transaction of subscription. That being so, it seems to me that a very clear context would be required to enable a meaning to be put on the word "purchase" in this section which would extend it so as to cover the acquisition of shares by subscription. Quite apart from those considerations of mere language of the Act, it seems to me that the word "purchase" cannot with propriety be applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. He does not purchase anything when he does that. Mr. Wynn Parry endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am unable to accept that view. A share is a chose in action. A chose in action implies the existence of some person entitled to the rights which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chose in action. The two legal transactions of the creation of a chose in action and the purchase of a chose in action are quite different in conception and in result. The result, therefore, is that I can find no context in this section which enables me to construe the word "purchase" as bearing the extended meaning suggested, and I cannot agree with the view which Bennett J. took on that part of the case. The position, therefore, is that the liquidator is entitled to obtain a proper judgment against Mr. Vanbergen on the basis of the first part of my judgment, but the learned judge's judgment in so far as it was based on s. 45, sub-s. 1, cannot stand.

The question then arises, on which it may be necessary to have some short discussion, what the form of the order should be. The liquidator does not ask Mr. Vanbergen to pay more than enough to pay the creditors of the company, excluding Mr. Vanbergen himself, who, if I recollect aright, is a creditor, and the costs of the liquidation. Indeed, it would be quite useless to order Mr. Vanbergen to pay any sum of money part of which might eventually come back to him as a shareholder on a distribution of surplus assets, nor can I see, as at present advised, how either of the other two directors, who are not before the court, could claim to be entitled to share in their capacity as shareholders in any money which Mr. Vanbergen is ordered to pay. Be that as it may, nothing which I have said must be taken as expressing any concluded opinion as to their position. The liquidator only asks for a judgment limited in the way which I have indicated. If that amount, whatever it may be, is one which is not less than the loss which V. G. M. has sustained by getting these worthless shares and obtaining a debt owing from Century which apparently will produce little or nothing, no further inquiry would be needed. On the other hand, it is right to say that it might on some conceivable view be possible to show that some nominal small value ought to be attributed to these shares. I do not know what sort of dividend Century is likely to pay on that debt. Accordingly, if an inquiry to ascertain what loss the company has suffered by the misfeasance is pressed for, it seems to me, as at present advised, that it would have to be ordered with the usual risk as to costs.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree.

[Jan. 21. The court declared that Vanbergen was guilty of misfeasance or breach of trust in relation to the company making the payment of 15,980*l.*, and that he was liable to contribute to the assets of the company by way of compensation in respect of such misfeasance or breach of trust an amount sufficient (with the other assets of the company) fully to pay and discharge all the debts of the company (other than any debt to himself) with interest thereon at the rate of 4 per cent. from the date of the liquidation of the company. An inquiry was ordered to ascertain the company's loss.]

Appeal dismissed; order varied.

Solicitors: *C. Butcher & Simon Burns; Sidney Pearlman.*

F. C.

STOKER *v.* ELWELL.

SIMONDS J.

1942 Jan. 15; Feb. 3.

Interest—Charge—Shares—Judgment debt and costs—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 14—*Judgments Act Amendment Act,* 1840 (3 & 4 *Vict. c.* 82), *s.* 1.

A charging order on shares, made in 1889 pursuant to a judgment for the amount of a debt and for costs, contained no provision for interest. In 1940, the court ordered (inter alia) that an account be taken of what was due under the order, and that stock then representing the shares charged should be sold and the proceeds of the sale lodged in court. On a summons to determine whether interest was payable on the debt and the costs, and, if otherwise payable, whether it was statute barred :—

Held, that, under s. 14 of the Judgments Act, 1838, interest was payable, although it was not mentioned in the charging order.

In re Drax [1903] 1 Ch. 781; *In re Kerr's Policy* (1869) L. R. 8 Eq. 331; and *Lippard* v. *Ricketts* (1872) L. R. 14 Eq. 291, applied.

ADJOURNED SUMMONS.

On May 28, 1889, in the Queen's Bench Division, Bessie Samms Foakes recovered against Arthur Brin judgment for a debt of 1870*l.*, and costs amounting to 22*l.*, and on the same day she obtained an order nisi charging with the payment of those sums certain shares in public companies in England standing in Brin's name in his own right. On June 18, 1889, the order was made absolute. No mention of interest was made in it. On May 17, 1892, Foakes died and the plaintiff became administrator of her estate. On July 8, 1894, Brin died and in 1931 the defendant became administrator of his estate. On June 4, 1940, it was ordered (inter alia) that an account be taken of what was due under the charging order to the plaintiff as administrator of Foakes, and that stock then representing Brin's shares subject to the charging order be sold and the proceeds of the sale lodged in court. The question raised on the present summons, was whether any interest was payable under the charging order in respect of the amount of the debt and the costs, and, if any interest was otherwise payable, whether it was to any and what extent barred by any Statute of Limitations.

Danckwerts for the plaintiff. Interest is payable under s. 14

SIMONDS
J.
1942
STOKER
v.
ELWELL.

of the Judgments Act, 1838 (1), both on the amount of the debt and the costs of obtaining the judgment. The charge creates the same position as there would be if an equitable charge had been created by Brin himself, and interest became payable automatically: *In re Kerr's Policy* (2); *Lippard* v. *Ricketts* (3); *In re Drax* (4). Also, where there is a lien on personal property which is the subject-matter of a sale, which is the case here, no Statute of Limitations can apply: see *In re Stucley* (5) per Vaughan Williams L.J.

H. A. Rose (for *Mavrogordato*, on war service). Interest is not payable on the debt or on the costs. That is clear from the fact that the court could have ordered that the shares should "stand charged with the payment of the amount . . . . "and interest thereon," but purposely did not make that order. In the Chancery Division interest is mentioned in the order if it is intended to be payable (see Seton on Judgments and Orders, 7th ed., vol. i., p. 468, Form 2, and Daniell's Chancery Forms, 7th ed., pp. 351–352, Form 721), although in the King's Bench Division it is not mentioned at all. In *Daponte* v. *Schubert & Roy Nominees, Ld.* (6) and *Attwood* v. *Gibbons* (7) the order did not mention interest. In *Leggott* v. *Western* (8) it did. [*In re Leavesley* (9) was also referred to.] If, however, the court is against the view that interest is not payable, then the payment of interest in the present case must be statute barred. A judgment creditor asking for a charging order is not helpless. He already has the judgment and is simply asking the help of the court in implementing it. Not until 1940 was this judgment implemented by the obtaining of the order for the sale of shares and payment into court, and interest cannot properly be claimed.

---

(1) By Judgments Act, 1838, s. 14: ". . . . if any person "against whom any judgment "shall have been entered up in "any of Her Majesty's superior "courts at Westminster shall have "any . . . . stock, or shares ". . . . in any public company "in England . . . . standing in "his name in his own right, ". . . . it shall be lawful for a "judge of one of the superior "courts, on the application of any "judgment creditor, to order that "such stock . . . . or shares ". . . . shall stand charged with "the payment of the amount for "which judgment shall have been "so recovered, and interest "thereon, and such order shall "entitle the judgment creditor to "all such remedies as he would "have been entitled to if such "charge had been made in his "favour by the judgment debtor; ". . . ."

(2) (1869) L. R. 8 Eq. 331.

(3) (1872) L. R. 14 Eq. 291.

(4) [1903] 1 Ch. 781.

(5) [1906] 1 Ch. 67, 77.

(6) [1939] Ch. 958.

(7) Unreported: see [1939] Ch. 966, note (1).

(8) (1884) 12 Q. B. D. 287.

(9) [1891] 2 Ch. 1.

Danckwerts in reply. In *In re Drax* (1) it is treated as a general rule that, wherever there is a general charge, interest follows unless there is something to exclude it. Here there is nothing to exclude it, and the claim to it is supported by the statutes cited.

Rose. It is true that, by s. 17 of the Judgments Act, 1838, every judgment debt is to carry interest at 4 per cent. from the time of entering up the judgment, and that, by s. 18, an order of the court of equity is to have the effect of a judgment in the superior courts of common law, and that the plaintiff is to be deemed a judgment creditor within the meaning of the Act. That, however, does not alter the position, which is that, as interest was deliberately not mentioned in this order, it is not payable, or, if it would otherwise be payable, it is statute barred. Under ss. 17 and 18, also, interest is recoverable on costs which one party is ordered to pay to another in the Chancery Division and in the King's Bench Division and in lunacy: see Annual Practice, 1942, p. 1433, note on "Interest on costs."

Cur. adv. vult.

1942. Feb. 3. SIMONDS J. read a judgment in which he stated the facts and continued: Order XLVI., r. 1, provides "an order charging stock or shares may be made by any "divisional court or by any judge . . . . and the effect shall "be such as is provided by the Acts, 1 & 2 Vict. c. 110, ss. 14 "and 15, and 3 & 4 Vict. c. 82, s. 1." I need refer only to s. 14 of the earlier Act. The plaintiff, claiming in right of the creditor, contends that the effect of this section is that he is entitled to interest, notwithstanding that the charging order

(1) [1903] 1 Ch. 781.

makes no mention of interest. He says that, if the judgment debtor had himself made a charge on these shares for a principal sum without mentioning the interest, the remedy of the judgment creditor would have included the right, on enforcement of the security, to recover the principal sum and interest at 4 per cent. He claims the benefit of the general principle stated by Collins M.R. in *In re Drax* (1) where he says: "It "seems to me to be well established on the authorities . . . . "that a court of equity has power to give interest, and in point "of fact does so where a charge is created on land, although "there are no words allowing interest in the instrument "creating the charge." In the case cited, the charge was on land, and the reference was to such a charge, but the same principle was stated and applied in *In re Kerr's Policy* (2), where the charge was created by a deposit of a policy of life assurance to secure a principal sum without any stipulation as to interest. There James V.-C. says: "I think that a "deposit of title deeds to secure a loan is to be considered as "an agreement to execute a mortgage of the property comprised in the deeds with interest." The same principle is exemplified in *Lippard* v. *Ricketts* (3). There the court had ordered that certain costs to which a petitioner was entitled should be added to the moneys secured by a certain deed and should "stand as a charge upon" the properties comprised in the deed. The order said nothing about interest, although the court had power under the Attorneys Act, 1878, expressly to charge interest if it thought fit. It was held by Bacon V.-C. that interest was payable on the principal sum charged. "The costs," he said, "are charged on the security by the "express order of the court. The effect of that order is to "increase the amount charged on the security, and upon the "sum so charged, I think, interest is payable. In the case of "*In re Kerr's Policy* (2), the court seems to have proceeded on "the theory that a debt secured by equitable mortgage will, "unless something is said or may be implied to the contrary, "carry interest; and it seems to follow that when the court

---

(1) [1903] 1 Ch. 781, 793.
(2) L. R. 8 Eq. 331, 336.
(3) L. R. 14 Eq. 291, 294.

SIMONDS
J.

1942

STOKER
v.
ELWELL.

"has once decided that there is a charge, the sum charged "must bear interest."

On the other hand, the defendant, who stands in the shoes of the judgment debtor, urges that the court, having power under the statute to charge principal and interest, deliberately abstained from charging interest. He points out that the appropriate forms in Seton on Judgments and Orders and in Daniell's Chancery Forms make express mention of interest, and contends that the omission of it from this order is deliberate and significant, and he claims that the remedy which the creditor would have had against the debtor, if he had made the charge, cannot include the right to recover interest deliberately excluded. I am unable to give effect to these contentions. It is true that in Seton's and Daniell's Forms, which are commonly used in the Chancery Division, interest is expressly charged, but in the forms given in Appendix "K" in the Annual Practice, which I am told are commonly used in the King's Bench Division, no mention is made of interest. It might well be thought that since the charge is in respect of a judgment debt, which, by virtue of s. 17 of the very Act which authorizes the charging order, itself carries interest, it is superfluous to mention interest in the charging order. But, however this may be, I am not disposed to exclude a charging order from the operation of the general principle to which I have referred merely because in one division of the High Court the practice has been more closely to dot the i's and cross the t's than in another.

I must refer, lest I should be thought to have overlooked it, to *In re Leavesley* (1), on which counsel for the defendant relied. In that case the Court of Appeal had to consider the effect of a charging order where the judgment debtor was a lunatic, and rejected the contention that the effect of a charging order depended on the personal capacity of the debtor to execute a charge. I cannot derive any assistance from this case on the question which I have to determine. I come to the conclusion that, although interest is not mentioned in the charging order, it is nevertheless payable, and the account

(1) [1891] 2 Ch. 1.

SIMONDS J.
1942
STOKER v. ELWELL.

must proceed accordingly. The appropriate rate is 4 per cent.

Then comes the question whether any Statute of Limitations operates to bar the claim to interest. This question presents no difficulty. It is conceded that for this purpose the relevant date is May 7, 1940, when the originating summons was issued on which the order of June 4, 1940, was made, and it is clear that at this date, whatever may be the effect of recent legislation, there was no Statute of Limitations applicable to a charge on personal estate, whether by virtue of charging order, vendor's lien, or otherwise: see *In re Stucley* (1). I will direct an inquiry as to incumbrances, and the costs will be added to the plaintiff's security.

Solicitors: *Lloyd & Lloyd; Elwell & Binford Hole.*

(1) [1906] 1 Ch. 67.

K. R. A. H.

UTHWATT J.
1942
Jan. 28.

HERRMANN *v.* METROPOLITAN LEATHER COMPANY, LIMITED.

Emergency legislation—Landlord and tenant—War damage—"Multiple "lease"—Right to disclaim—Two buildings used as factory—One building destroyed—Other accommodation not available—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 15, *sub-s.* 3; *s.* 24.

A lease of factory premises comprised two adjacent but separate buildings connected by an overhead gangway. In September, 1940, one building was destroyed by fire caused by incendiary bombs, but the other was almost undamaged. The lessees gave notice of disclaimer, which the lessors refused to accept, and the lessees then remained in possession for a period and tried to carry on their business in one building, but found that they could not do so:—

Held, that the lease was a "multiple lease" within the meaning of s. 24 of the Landlord and Tenant (War Damage) Act, 1939, but, as it was (as the court found) impracticable for the lessees to conduct their business in the undamaged portion of the factory, or to obtain other convenient premises in the neighbourhood, it would be equitable to allow the lessees to disclaim the lease as a whole.

ADJOURNED SUMMONS.

The applicants, Robert Herrmann and Mrs. Renée Herrmann, claimed a declaration against the respondents, the Metropolitan Leather Co., Ld., that certain premises which had been let to the respondents by the applicants were held on a "multiple "lease" within the meaning of s. 15, sub-s. 3, of the Landlord and Tenant (War Damage) Act, 1939, and that it would not be equitable in the circumstances to allow the respondents to disclaim the lease as a whole. By the lease, dated May 9, 1937, the applicants demised to the respondents two adjacent buildings for a term of years commencing May 9, 1937, and ending on March 24, 1950, at a rent of 650*l.* a year. The lease contained a covenant by the respondents not to use the premises for any purpose other than a warehouse, factory and offices in connection with their business which consisted of tanning, currying and dressing leather. There was a courtyard between the buildings, communication between the two being effected by a gangway connecting the second floor of each building. Each building was a self-contained unit, but both buildings were used by the respondents as one factory, and on neither building taken by itself was any single operation comprised in the respondents' business carried through completely. On September 12, 1940, one building was destroyed by fire arising from incendiary bombs, but the damage done to the other building was inconsiderable. On October 9, 1940, the respondents served a notice of disclaimer on the applicants, who refused to accept it. Thereafter, the respondents remained in occupation and tried, unsuccessfully, to carry on their business in the undamaged building.

Roxburgh K.C. and *F. W. Wallace* for the applicants. This is a "multiple lease" within s. 15 of the Act of 1939. Only one building has been destroyed. It is possible to carry on the respondents' business in the other building, and, if necessary, other premises in the neighbourhood could be acquired. Before the respondents became the tenants of the two buildings they were let separately. In the circumstances it would not be equitable to allow the respondents to disclaim the lease as a whole. The disclaimer should be confined to the part destroyed and the rent apportioned.

Spens K.C. and *Pennycuick* for the respondents. This is not a " multiple lease." The phrase refers to the use or adaptation for use of the premises at the date of the lease, *Hazel* v. *Edwards* (1), and these premises were not used as separate premises, but as a single factory. Any adaptation which the premises have undergone has been made by the respondents to enable both buildings to be used as a single factory. This was a composite building let to a single tenant for the purpose of one business, and it cannot be regarded as held on a multiple lease simply because part of the premises could conveniently be used for some other business.

Assuming, however, that this is a multiple lease, it would not be equitable to refuse to allow the respondents to disclaim the lease as a whole. They have made every effort to carry on their business in that part of the premises which was not burnt down, but they have found it impossible to do so. It has also been impracticable to obtain other premises in the neighbourhood and use these in conjunction with the undamaged portion. The factory must be operated as a single unit.

Roxburgh K.C. replied.

UTHWATT J. The first question which I have to decide is whether this lease is a " multiple lease " within the Landlord and Tenant (War Damage) Act, 1939, and the second question is what relief it is equitable to allow the respondents to exercise in the circumstances.

A multiple lease is defined in s. 24 of the Act as "a lease "comprising buildings which are used or adapted for use as "two or more separate tenements." It is clear that both "adaptation," whatever that may mean, and " use " in fact are not necessary, but that it is sufficient if one or other of those conditions is satisfied. With regard to the latter half of the definition, that the lease must comprise buildings which are "adapted for use as two or more separate tenements,"

---

(1) [1941] 2 K. B. 140.

Mr. Spens argued that a physical meaning should be attached to the word "adapted," and that it would not be true to say of buildings that they had been "adapted for use" unless some actual physical work of adaption in the sense of alteration had been carried on in respect of them. It seems to me impossible to adopt that meaning. I do not propose to attempt to give an exhaustive definition of the phrase, but for the purposes of this case, and I am framing my words only for use in reference to the facts of this case, it seems to me that a building is "adapted for use as two or more separate tenements" if it is reasonably suitable for use as two or more tenements in the ordinary course of business. A lease comprising buildings possessing that character would, in my opinion, be a multiple lease. If that meaning is to be attributed to the phrase "multiple lease," it was conceded by Mr. Spens on the facts of this case that the lease with which I have to deal is a multiple lease.

That being so, I have to consider under s. 15, sub-s. 3, of the Act whether I am satisfied that, "having regard to the "extent of the war damage suffered by the land comprised in "the lease as a whole and all the circumstances of the case "(including any offers made by the landlord for an extension "of the term of the lease or for an alteration of the rent received "thereby or for any other modification of the terms of the lease) "it is equitable to allow the lease to be wholly disclaimed." On the construction of the sub-section the burden is on the lessee to satisfy me that it is equitable to allow him to exercise his right to disclaim. Further, I am entitled to look at all the circumstances of the case without limit. The lessees have used these premises as one factory unit. The ordinary course of work in the factory in making the goods involved that materials should be transferred from one building to another for the purpose mainly of the rough drying which was carried on in the front building. The whole of one building was destroyed, the superficial area of the space lost being something less than a half, but more than a third, of the whole area embraced by the buildings. The rental value of the two sets of buildings was very much the same. The damage suffered by the

UTHWATT J.

1942

HERRMANN v. METROPOLITAN LEATHER Co.

respondents was so extensive that it was impossible for them to continue to carry on their business in the way in which they had been accustomed. The remaining premises did not provide sufficient accommodation for the business. Those are the main facts affecting the buildings and the business there carried on. But there is one other matter which is of great importance, and that is whether it was reasonably practicable for the respondents to obtain further accommodation in the neighbourhood in which, with the use of their undamaged building, their trade could be reasonably carried on. If that were reasonably practicable, I do not think it would be equitable to allow the respondents to exercise their right of disclaimer in respect of the lease as a whole. It is, no doubt, true that the Act as a whole is designed for the relief of tenants, but in the case of s. 15, sub-s. 3, which does not work automatically as most of the other sections do, the court has to decide what should be done, after taking into consideration the position of both parties. This part of the case has given me considerable trouble. [His Lordship reviewed the facts, stating that, after the respondents had served their notice of disclaimer, they continued to use the undamaged building without the permission of the applicants and that they opened negotiations (which broke down) for a lease of the undamaged building, and continued :] I am satisfied that it was not reasonably practicable to obtain premises in the neighbourhood which could from a business point of view be said to be properly suited for the purposes of the respondents' business. The applicants have always been ready to modify the terms of the lease by relieving the respondents from the obligations as to user contained in the lease in any reasonable fashion, and I have not the slightest doubt that they would meet the respondents as regards any other reasonable alteration in the lease.

Taking into consideration all the circumstances, including the conduct of the respondents, and the disturbance and inconvenience to their business in carrying it on in the undamaged part and in probably unsuitable buildings situated some distance away, I have to consider what is equitable.

The general background of the Act, apart from this section, is that it is designed to give relief to lessees. It is true that landlords, like lessees, are exempted from the liability to make good and to repair where lack of repair is caused as the result of enemy action, but the whole intention of the Act, generally speaking, is, to my mind, that the burden of the loss which results from war damage is to fall on the landlord and not on the tenant. In those circumstances it appears to me that I ought in this case to hold that it is equitable to allow the respondents to exercise their right of disclaimer in respect of the lease as a whole, and I propose to make an order to that effect.

Solicitors for applicants : *Huntley, Son & Phillips.*
Solicitors for respondents : *Constant & Constant.*

H. L. L.

In re APPLICATION BY WOOLWICH EQUITABLE BUILDING SOCIETY (HAYWOOD).

FARWELL J.
1942
Feb. 10.

Emergency legislation—Mortgage—Appointment of receiver—Practice—Assignment of equity of redemption—Ex parte application for leave to appoint receiver—Evidence of assignment—Costs—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-ss.* 2 (*a*) (*ii.*) ; 4.

Where a mortgagor has assigned the equity of redemption an application by the mortgagee for leave to exercise any remedy under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, should be ex parte, neither the mortgagor nor the assignee being a proper respondent to the application because neither is a "person "liable . . . . to perform the obligation, ..." within s. 1, sub-s. 4, and so entitled to seek relief thereunder. The assignment should be produced with the mortgage or evidence thereof should be given to shew that the summons is properly ex parte.

PROCEDURE SUMMONS.

By an assignment dated September 13, 1940, Elsie Helena McDonald, the mortgagor, assigned to Sarah Alice Haywood, the assignee, her equity of redemption in the property comprised in a mortgage dated July 19, 1937, and made between the mortgagor and Woolwich Equitable Building Society. In the assignment the assignee covenanted with the mortgagor to pay the mortgage debt, but at the date of this summons principal moneys and interest had not been paid. By the summons the society asked leave, under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939 (1), to appoint a receiver of the property comprised in the mortgage. The assignee was the only respondent before the master, who adjourned the summons into court as a procedure summons. The court gave the society leave to add the mortgagor as a respondent, which it did, and the question arose whether either respondent was, or both respondents were, properly made parties to the proceedings.

R. J. Sutcliffe for the society. Both the mortgagor and the assignee are properly respondents to the summons. It is true that the mortgagor, having parted with the equity of redemption, is no longer interested in the property. The assignee, however, is liable to the mortgagor to pay the debt and the mortgagor can enforce that liability. It, therefore, follows that the assignee is a "person liable . . . . to perform the "obligation . . . . " within s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939. In *In re Abbey Road Building Society* (2) it was held that the intention of s. 1 of the Act is that the respondent to such an application as the present should be the person in whom the equity of redemption is vested. In *In re Hearts of Oak Permanent Building Society's Application* (3) it was held that, where the assignee had become bankrupt, the proper respondent to an application for liberty to exercise remedies under s. 1, sub-ss. 1, 2 and 3, was the trustee in bankruptcy. In *National Provincial Bank, Ld.* v. *Liddiard* (1), where property was mortgaged to secure all moneys which might become due from a person other than the mortgagor and the mortgagor did not covenant to repay the debt, it was held that the mortgagor did not come within s. 1, sub-s. 4, and that, therefore, the mortgagee did not need leave to enforce the security. In *In re Midland Bank, Ld.'s Application* (2) the mortgagor had covered the borrowing of a third party, but did not covenant personally to repay the moneys lent, and he, too, was held not to be the person liable within s. 1, sub-s. 4, but in neither of these cases was it suggested that the mortgagor was not properly a respondent. It is clear from the authorities that the mortgagor in the present case could not properly have been made the only respondent, and, therefore, the only course open to the society was to make both the mortgagor and the assignee respondents.

---

(1) By Courts (Emergency Powers) Act, s. 1, sub-s. 2: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court,—(*a*) to "proceed to exercise any remedy "which is available to him by "way of . . . . (ii.) the . . . . "appointment of a receiver of any "property; . . . . ."

By sub-s. 4: "If, on any "application for such leave as is "required under this section for "the exercise of any of the rights "and remedies mentioned in "sub-ss. 1, 2 and 3 of this section, "the appropriate court is of "opinion that the person liable "to satisfy the judgment or order, "or to pay the rent or other debt, "or to perform the obligation, in "question is unable immediately "to do so by reason of circum-"stances directly or indirectly "attributable to any war in which "His Majesty may be engaged, "the court may refuse leave for "the exercise of that right or "remedy, or give leave therefor "subject to such restrictions and "conditions as the court thinks "proper."

(2) [1940] Ch. 239.

(3) [1942] W. N. 21.

R. W. Goff for respondents. Neither the mortgagor nor the assignee ought to have been made respondent. The summons ought to have been ex parte. In the cases which have been considered the mortgagor had either become bankrupt, or he had mortgaged the property as collateral security without entering into any covenant to pay the principal money or interest. An assignee is under a personal liability to the mortgagor to discharge the indebtedness of the mortgagor, but he is under no liability to the mortgagee. It is clear that the remedy sought by the society is essentially against the property and not against either respondent.

Sutcliffe replied.

FARWELL J. The question which arises for decision on this summons is whether either the mortgagor or the assignee ought to be a respondent, or whether both of them ought to be respondents. I find it difficult to see why the mortgagor should be made a respondent. The relief claimed is not against her on her personal covenant to pay, but is by the appointment of a receiver, against the property. I cannot think that in those circumstances the mortgagor is a necessary party, because the court does not make, or allow to be made, respondents to proceedings persons who have no right to claim relief and no interest in the question to be determined.

---

(1) [1941] Ch. 158.

(2) [1941] Ch. 350.

The position with regard to the assignee is a little more difficult. The assignee is not under any personal obligation to the society. It is said, however, that she is under an obligation to the mortgagor to pay the debt, thus relieving the property from the burden placed on it, that the mortgagor is entitled to enforce that obligation, and that the assignee is, therefore, a "person liable . . . . to perform the obligation, ..." within s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939. The assignee may be liable to pay off the mortgage debt as the result of either an implied covenant or the express covenant between herself and the mortgagor, but, in my view, it does not follow that she is a "person liable . . . . to perform the obligation, ... " within s. 1, sub-s. 4. The Act does not apply as between a person who is entitled to enforce an obligation (in this case the society) and another person who is not liable to perform that obligation (in this case both the mortgagor and the assignee). No doubt, it is true that the owner of an equity of redemption is interested to preserve the property if he can, but, unless he is the mortgagor, he does not come within s. 1, sub-s. 4, because he is not the "person liable . . . . to perform the obligation . . . ." That may cause some difficulty and, possibly, there is a casus omissus in the case of an assignee, but, on the true construction of the Act, there is not, in a case of this kind, any person who is entitled to seek relief under the Act. It follows that a person who wishes to enforce his rights must obtain the leave of the court, but cannot make anyone respondent to the summons. In my judgment, therefore, the only proper course in such a case as the present is to take out a summons ex parte. The result may be unfortunate and, possibly, the Act requires amendment. I will treat this application as being ex parte and give the leave sought, namely, to appoint a receiver.

The practice under this Act has always been that the court does not inquire into the merits of a case. It will not, for instance, inquire whether a power of sale has arisen. If an applicant sells before the power of sale has arisen he cannot shelter behind the leave given by this Act. The mortgagor, by proper proceedings in the appropriate court, can take such steps as he may think right to prevent the applicant from proceeding to exercise some power which he is not entitled to exercise. On an application under this Act the court is concerned merely to ascertain whether any person can claim

FARWELL J.
1942
Woolwich Equitable Building Society's Application, In re.

relief on the grounds stated in the Act. If no one can do so, the court simply gives leave to the applicant to exercise any remedy which is available to him. In the circumstances, the proper course is to make no order as to costs.

[Counsel invited his Lordship's attention to a practice direction that applications of the kind before the court in the present case should not be supported by evidence in the first instance, and suggested that, where an application was made ex parte because the equity of redemption had been assigned, the assignment ought to be proved so that the court might see that no respondent is required.]

Farwell J. It is desirable that the assignment should, if possible, be produced with the mortgage to shew that the application is properly made ex parte. The costs of these applications ought, however, to be kept as low as possible and there should, therefore, be no evidence in the first instance, except sufficient to shew that the application is properly made ex parte.

Solicitor for the society: *A. E. Shrimpton.*
Solicitors for the respondents: *Harold Kenwright & Cox.*

K. R. A. H.

WARRILOW *v.* WARD.

FARWELL J.
1942
Feb. 20.

Mortgage—Interest rate—Seven per cent. after deduction of income tax—Standard rate not affected by increase of tax—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1; *s.* 12, *sub-s.* 1 (*b*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *sch. I.*

Emergency legislation—Application for leave to exercise remedy—Question to be determined by the court—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.

A mortgage of land made in 1929 to secure 1000*l.* and interest contained a covenant by the mortgagor to repay the principal and in the meantime to pay interest thereon at such a rate as after deduction of income tax would yield to the mortgagee the clear rate of 7*l.* per cent. per annum. The property became subject to the Rent and Mortgage Interest Restrictions Act, 1939, on its coming into force on September 2, 1939, and immediately before that date, the gross rate of interest including income tax at 5*s.* 6*d.* in the pound was 9.65 per cent. per annum :—

Held, that the standard rate of interest within the meaning of s. 12, sub-s. 1 (*b*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sch. I. to the Act of 1939, was 9.65 per cent., and that no increased rate based on any subsequent increase in the rate of income tax was recoverable by the mortgagee from the mortgagor.

Semble : The court on an application for leave to exercise a remedy under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, will not consider the rights of the parties or whether the applicant is entitled to take the step which he proposes to take, but will merely determine whether the respondent has shown that he is entitled to the relief provided by the section.

ADJOURNED SUMMONS.

By a legal charge dated September 27, 1929, the plaintiff, Reginald John Ward, advanced a sum of 1000*l.* to the defendant, Alfred Frank Warrilow, on the security of certain property, the defendant covenanting to pay the 1000*l.* on a future date together with interest thereon " at such rate "as after deduction of income tax will yield to the mortgagee "the clear rate of 7*l.* per cent. per annum," and, if the principal should not be paid on that day, to pay interest at the rate aforesaid on the principal for the time being remaining owing. The property charged became subject to the provisions of the Rent and Mortgage Interest Restrictions Act, 1939, and when that Act came into force on September 2, 1939 (see Defence (Commencement of Enactments) Order, St. R. & O. 1939, No. 1135), the income tax was 5*s.* 6*d.* in the pound, the effect being that the total rate of interest including income tax amounted to 9.65 per cent. The plaintiff issued this summons claiming a declaration that on the true construction of the legal charge and of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the standard rate of interest payable was such a rate as after deduction of income tax at the rate payable for the time being yielded the clear rate of 7*l.* per cent. per annum. The summons also asked for leave under the Courts (Emergency Powers) Act, 1939, to appoint a receiver.

Guest Mathews for the plaintiff. There is nothing in the Rent and Mortgage Interest Restrictions Act, 1939, which alters the standard rate of interest agreed on by the parties. The only enactment which affects the case is s. 25 of the

Finance Act, 1941 (1), and that does not apply to the arrears of interest. The standard rate of interest within s. 12, sub-s. 1 (*b*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sch. I. to the Rent and Mortgage Interest Restrictions Act, 1939 (1), was and still is 7 per cent. free of income tax. If the amount payable, including income tax, has been increased, that has not been brought about by any act of the mortgagee but by the legislature in increasing the rate of income tax.

Pascoe Hayward for the defendant. The standard rate of interest free of tax was stabilized at 9.65 per cent. on September 2, 1939, and the mortgagor is not liable to pay

---

(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sch. I.: "Subject to the provisions of this "Act, where the rent of any "dwelling-house to which this Act "applies, or the rate of interest on "a mortgage to which this Act "applies, has been since September 1, 1939, or is hereafter, "increased, then, if the increased "rent exceeds the standard rent "by more than the amount permitted under this Act, or, as the "case may be, if the increased "rate of interest exceeds the "standard rate of interest, the "amount of such excess shall, "notwithstanding any agreement "to the contrary, be irrecoverable "from the tenant or the mortgagor, as the case may be: "Provided that, where a landlord "or mortgagee has increased the "rent of any such dwelling-house "or the rate of interest on any "such mortgage since the said "date, but before the commencement of the Rent and Mortgage "Interest Restrictions Act, 1939 "[i.e., September 2, 1939], he may "cancel such increase and repay "any amount paid by virtue "thereof, and in that case the "rent or rate shall not be deemed "to have been increased since "that date."

By s. 12, sub-s. 1 (*b*): "The "expression 'standard rate of "'interest' means, in the case of "a mortgage in force on September "1, 1939, the rate of interest payable at that date, or, in the case "of a mortgage created since that "date, the original rate of "interest."

By Finance Act, 1941, s. 25, sub-s. 1: "Subject to the provisions of this section, any "provision, however worded, for "the payment, whether periodically or otherwise, of a stated "amount free of income tax, or "free of income tax other than "surtax, being a provision which "—(*a*) is contained in any deed "or other instrument . . . . and "(*b*) was made before September "3, 1939, and (*c*) has not been "varied on or after that date, shall, "as respects payments falling to "be made during any year of "assessment, the standard rate of "income tax for which is ten "shillings in the pound, have "effect as if for the stated amount "there were substituted an amount "equal to twenty twenty-ninths "thereof."

FARWELL J.

1942

WARRILOW v. WARD.

any more than that. After September 2, 1939, there was an increase of income tax, but the amount of that increase is irrecoverable. The effect of the Rent and Mortgage Interest Restrictions Act, 1939, is that the mortgagee cannot become liable after the date when it came into force to pay any increased interest based on any rise in the rate of income tax. He referred to *Goldsmith* v. *Orr* (1).

Mathews replied.

FARWELL J. This summons, as originally constituted, was entitled " In the matter of the Courts (Emergency Powers) "Act, 1939," and by it the plaintiff sought leave to appoint a receiver. In my judgment, that procedure was wrong for the purpose of getting decided a question of the rights of the parties depending on the true construction of a mortgage. Under the Courts (Emergency Powers) Act, 1939, the only question which the court has to consider is whether there are sufficient reasons due to the war shown by the respondent to disentitle the applicant to any remedy which he may be entitled to exercise. On summonses under the Act the court does not consider the rights of the parties or determine how far the step which the applicant desires is one which he can properly take. It considers, not whether the power of sale has arisen or any question of that sort, but only whether the respondent has shown cause why the applicant should not exercise any power which he may have. That being so, this summons, in my judgment, was wrongly constituted.

Both parties, however, are anxious to get the question at issue decided, and the plaintiff has accordingly amended his summons by entitling it : " In the matter of a legal charge "dated September 27, 1929, and in the matter of the Rent "and Mortgage Interest Restrictions Acts, 1920 to 1939." By that summons he asks for a declaration that on the true construction of the legal charge and of the Acts the standard rate of interest within the meaning of the Acts payable under the provisions of the charge is such a rate as after deduction therefrom of income tax at the rate payable for the time being yields the clear yearly rate of 7*l*. per centum per annum. I am, therefore, dealing with this summons simply as a matter of the construction of the charge, and in no way with any question under the Courts (Emergency Powers) Act, 1939.

The contention of the defendant is that the effect of s. 12, sub-s. 1 (*b*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sch. I., was to stabilize, as at the date of the coming into operation of the Act of 1939, the rate of interest payable under the charge at the rate of 9.65*l.* per cent., being the rate equivalent to plain interest at 7*l.* per cent. together with tax at the rate of 5*s.* 6*d.* in the pound. The plaintiff contends that the standard rate of interest within the meaning of s. 12, sub-s. 1 (*b*), of the Act of 1920, as amended, is the rate specified in the charge, namely, such a rate as after deduction of income tax will yield the clear rate of 7*l.* per cent. per annum. It is admitted that the arrears which the plaintiff is claiming are not affected by s. 25 of the Finance Act, 1941.

---

(1) [1920] W. N. 250.

The Act of 1920 did not apply to this property, but the Act of 1939 brought it within the scope of the earlier Act. I confess to some difficulty in appreciating exactly the effect of the proviso to s. 1 of the Act of 1920, but I refer to it because it is said that it makes it clear that this section only applies to interest which has been agreed between the parties and has no application to a case such as the present where the rate of interest varies from time to time according to the increase or otherwise of income tax.

In my judgment, on the true construction of the Acts and of this charge, the defendant's contention is right. I cannot see that the Act does not apply because the actual amount which has to be paid in each year is regulated by the amount of tax which is payable. It is said that the rate is fixed, not by the parties themselves, but by the Finance Act and, therefore, it does not come within the Rent and Mortgage Interest Restrictions Act, 1939. In my judgment, the answer is that the rate of interest was agreed by the parties and, therefore, it comes within the Act. The effect of s. 1 of the Act of 1920, as amended by the Act of 1939, is that, as from September 1, 1939, the rate cannot be increased beyond the amount which was then payable. The standard rate of interest in force on September 1, 1939, was 7 per cent. plus the amount necessary to enable that sum to be paid free of income tax. Income tax at that date was 5*s.* 6*d.* in the pound, and the rate then payable cannot be increased. Accordingly, the actual rate of interest payable on September 1, 1939, which has been agreed to be 9.65*l.* per cent., is the rate payable in

FARWELL J.

1942

WARRILOW v. WARD.

the future, subject, of course, to the provisions of s. 25 of the Finance Act, 1941.

I should refer to *Goldsmith* v. *Orr* (1), which came before the Court of Appeal under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919. There the position was different from the present because the actual rent payable was not an amount which varied according to the rate of income tax payable, but had been agreed between the parties. It was held that the rent which was payable in 1919 was the rent properly payable, and could not be increased. The Court of Appeal was not in agreement, Warrington L.J. dissenting from the views expressed by Bankes and Scrutton L.JJ. I do not think that that decision is binding on me, but it is one which, in my judgment, strongly supports the view which I have expressed. Accordingly, I propose to dismiss the summons with costs.

Solicitors for plaintiff: *E. B. V. Christian & Co., for Maidment & Morgan, Portsmouth.*

Solicitors for defendant: *Lamartine Yates & Morgan.*

H. L. L.

---

(1) [1920] W. N. 250.

BENNETT J.

1942

Feb. 23.

In re CITY HOUSING TRUST, LIMITED.

KOLB *v.* THE COMPANY AND OTHERS.

Debenture—Debenture holder's action—Certificate for trustees' remuneration—Clerical error—Correction—Costs and remuneration of trustees—Priority as against debenture holder—R. S. C. O. LV., *r.* 71.

In a debenture holder's action the master's certificate for the trustees' remuneration contained a wrong date owing to a clerical error. Also, in his order for payment out of funds in court of the plaintiff's costs, the costs of the trustees of the debenture trust deed, and their costs, charges and expenses of that deed, he did not direct the order in which those costs were to be paid and, because the matter was not called to his attention, did not provide for the trustees' remuneration. The registrar in companies' winding up, on application, varied the certificate by ordering that the right date be substituted for the wrong one, and varied the master's order by ordering that the trustees' costs (including their costs, charges and expenses of the deed) and their remuneration be

BENNETT J.
1942
City Housing Trust, Ld., *In re.*
Kolb *v.* The Company.

paid in priority to the plaintiff's costs. On a motion to vary the registrar's order in so far as it altered the date in the certificate and varied the master's order by giving priority to the remuneration :—

Held : (1.) that the registrar had properly altered the date in the certificate under R. S. C. O. LV., r. 71 ; (2.) that he had properly given priority to the trustees' costs and to their costs, charges and expenses of the trust deed ; *In re Griffith* [1904] 1 Ch. 807 applied ; (3.) that the master had not intended by his order to deprive the trustees of priority for their remuneration, and that, as the fund out of which it could be paid was still available, the registrar had properly ordered that it be paid in priority to the plaintiff's costs under O. XXVIII., r. 11.

In re Roper (1890) 45 Ch. D. 126 followed. *Preston Banking Co.* v. *William Allsup & Sons* [1895] 1 Ch. 141, and *MacCarthy* v. *Agard* [1933] 2 K. B. 417, distinguished.

MOTION.

On July 19, 1940, the master certified in a debenture holder's action for the remuneration of the trustees of the debenture trust deed from January 1, 1939, during the continuance of the security. The date was wrong and ought to have been January 1, 1937. On October 17, 1940, he ordered that the plaintiff's costs of the action and certain costs of the trustees be taxed to the date of the order and that funds in court in the action be dealt with as directed in a schedule to the order which stated the amount of the funds and provided for the taxation of the plaintiff's costs and the trustees' costs under the order. The order did not provide for the trustees' remuneration and did not prescribe the sequence in which the costs directed to be taxed and paid were to be paid out of the funds in court. It was common ground that the trustees' remuneration had priority over the plaintiff's costs of the action and over the trustees' costs of the action out of the property charged by the trust deed, and that, if the proceeds of sale of the property would not cover the plaintiff's and the trustees' costs of the action, the trustees' costs had priority over the plaintiff's costs. On December 17, 1941, the registrar in companies' winding up ordered that the date in the certificate be corrected, that, notwithstanding the order of October 17, 1940, the trustees' costs of the action, including their costs, charges and expenses of the trust deed, be taxed pursuant to that order and that their remuneration as trustees from January 1, 1937, to December 31, 1941, be paid in addition to their costs out of the funds in court in priority to the plaintiff's costs. The plaintiff objected to the correction of the date in the

BENNETT J.
1942
City Housing Trust, Ld., *In re.*
Kolb *v.* The Company.

certificate and to the priority given to the trustees' remuneration and moved that the registrar's order be varied.

Heckscher for the plaintiff. In the master's certificate the figure "9" ought to have been "7," but it did not lie within the registrar's jurisdiction to make the variation. Accordingly, the registrar's order ought now to be varied in that respect by this court. As to the priorities, the registrar was right in ordering that the trustees' costs of the action and their costs, charges and expenses of the trust deed be paid in priority to the plaintiff's costs (*In re Griffith* (1)), but was wrong in giving priority to their remuneration. The master did not mention their remuneration in his order, and, therefore, he cannot be said to have made a mistake in the nature of a slip. Thus, the plaintiff's right to payment of her costs in priority cannot now be disturbed and the trustees cannot be given priority for their remuneration under the slip order or under the inherent jurisdiction of the court: *Preston Banking Co.* v. *William Allsup & Sons* (2); *MacCarthy* v. *Agard* (3).

Pennycuick for the trustees. The entry of the wrong date in the master's certificate was a mere clerical error and, as such, can be amended by the court under O. LV., r. 71 (4). Under that rule, the question of amendment lay within the discretion of the registrar, who was clearly within his jurisdiction in ordering it. He was also correct in giving priority to the trustees' remuneration: see O. XXVIII., r. 11. On the question of that priority the court ought to follow *In re Roper* (5). There the court of first instance made an order on further consideration for payment of costs which would have deprived a charity of its legacy under a will because the Attorney-General had inadvertently not asked the court to reserve the question out of what fund the costs should be paid. The court had not intended that the charity should lose its legacy. That could have been avoided by directing that they be paid out of another fund which was available and, on appeal, it was ordered that they be recouped out of that fund. Likewise, in the present case, the master did not intend by his order to deprive the trustees of their right to priority for their remuneration. He did not provide for it in his order simply because his attention had not been invited to the matter.

---

(1) [1904] 1 Ch. 807.

(2) [1895] 1 Ch. 141.

(3) [1933] 2 K. B. 417.

(4) By R. S. C. O. LV., r. 71: "The judge may, if the special "circumstances of the case require "it, upon an application by motion "or summons for the purpose, "direct a certificate to be discharged or varied at any time "after the same has become "binding on the parties."

By O. XXVIII, r. 11: "Clerical "mistakes in judgments or orders, "or errors arising therein from "any accidental slip or omission, "may at any time be corrected "by the court or a judge on motion "or summons without an appeal."

(5) (1890) 45 Ch. D. 126.

Heckscher in reply. In *In re Roper* (1) the court did not purport to be acting under the slip order, and the order made in that case was very different, in its nature and its effect, from the one which the registrar made in the present case.

BENNETT J. I have no doubt that, in the circumstances, the court is entitled to amend the mere clerical error under O. LV., r. 71. I think that I should be doing less than justice were I to interfere with the decision of the registrar who has directed in his order that that clerical error shall be rectified. I am clear that in that regard his order was perfectly proper and, to that extent at least, the plaintiff fails in her motion to vary it.

The other respect in which she moves to vary the order is of greater importance. The plaintiff does not (and, in view of the decision of Farwell J. in *In re Griffith* (2) cannot) object to that part of the registrar's order which provides that the trustees' costs of the action and their costs, charges and expenses as trustees of the trust deed shall be paid out of the fund in court in priority to her costs. She does, however, object to the direction that the trustees are to have priority not only for their costs but also for their remuneration. Plainly, the master, had the matter been called to his attention when he made his order, would have directed that the trustees' remuneration be paid out of the fund in court before and in priority to the plaintiff's costs. It is said now that it is too late for any direction to be given which interferes with the plaintiff's vested right to have her costs paid in priority to the trustees' remuneration, because any alteration made in the order is not being made because the court made a slip or a mistake and, therefore, the matter cannot be put right under the slip order or under the inherent jurisdiction of the court. In support of that argument Mr. Heckscher has relied on *Preston Banking Co.* v. *William Allsup & Sons* (3) and *MacCarthy* v. *Agard* (4). In *Preston Banking Co.* v. *William*

(1) 45 Ch. D. 126.
(2) [1904] 1 Ch. 807.
(3) [1895] 1 Ch. 141.
(4) [1933] 2 K. B. 417.

Allsup & Sons (1) the applicant had been ordered by the Vice-Chancellor to pay certain costs and he subsequently applied that they should be made costs in the action. The Vice-Chancellor refused that application, and the Court of Appeal dismissed an appeal from that refusal, on the ground that the Vice-Chancellor had been asked to rehear a previous decision. Lord Halsbury said (2): "But this is an application "to the Vice-Chancellor in effect to rehear an order which he "intended to make, but which, it is said, he ought not to "have made. Even when an order has been obtained by "fraud, it has been held that the court has no jurisdiction to "rehear it." That is wholly different, I think, from the present case. The Vice-Chancellor had deliberately made the order which he was afterwards asked to alter. In *MacCarthy* v. *Agard* (3) a married woman had been sued as Mrs. A., and as a married woman. In fact she was neither Mrs. A. nor a married woman, but was a Mrs. W. and a widow. The judgment had been settled in the form in *Scott* v. *Morley* (4) and, on the facts being ascertained, the plaintiff asked by summons that it be altered to a personal judgment against the defendant, describing her as "Mrs. W., a widow." That application was refused by the Court of Appeal. That, again, is, I think, different from this case, for there, too, the judgment was in the form in which the court intended it to be. In the present case, until the matter came before the learned registrar on December 17, 1941, the court had never considered the order in which the various claims on the fund ought to be paid. The court had never decided that the plaintiff's costs had priority over the trustees' remuneration. It is common ground that the trustees' remuneration has priority over the plaintiff's costs. The costs have not been paid and the matter can still be put right. It seems to me that in principle such a case is governed by *In re Roper* (5). The headnote in that case reads as follows: "A testatrix bequeathed a mixed fund "of pure personalty and money to arise from realty directed by "her will to be sold, to A. for life, and then to a charity. In a "suit to administer the estate, an order on further considera"tion was made, which directed the costs of suit and certain "legacies to be paid out of four sums of cash in court, two of "which arose from realty, and two from pure personalty, so "far as they would extend, the deficiency to be raised out of

(1) [1895] 1 Ch. 141.
(2) Ibid. 143.
(3) [1933] 2 K. B. 417.
(4) (1887) 20 Q. B. D. 120.
(5) 45 Ch. D. 126.

"a sum of stock in court which represented realty. There "was no reservation of subsequent further consideration nor "of the question how the costs should ultimately be borne. "The dividends on the residue of the fund were ordered to "be paid to A. for life with liberty to apply. On A's death "the testatrix's heir-at-law petitioned for the payment of the "fund to him as being realty. The Attorney-General, for "the charity, objected that the costs of administering the "real estate ought to have been paid out of the proceeds of "real estate, in which case there would have been left a substantial sum of pure personalty which the charity could "take. Kay J. considered that the order on further consideration settled the question how the costs were to be borne, "and ordered payment of the fund to the heir. The Attorney-"General appealed :—Held, by Cotton and Bowen L.JJ., that "the costs of administering the realty ought to have been "paid out of the proceeds of realty, and that as the order on "further consideration contained no declaration as to the "ultimate incidence of the costs and did not indicate any "intention to decide that question, the application of the "sums of cash in payment of costs and legacies must be treated "as directed for convenience without any intention to alter "the rights of the parties, and that as the fund was still in "hand, the Court, although there was no express reservation of "the ultimate incidence of the costs, ought now to set the matter "right . . . ." Cotton L.J. said (1): " . . . . if we see on "the true construction of this order that there was no intention "whatever to decide the rights of the parties, I do not think "that the mere fact that this payment of costs was directed "by an order on further consideration ought to prevent the "court from setting the matter right where there is a fund in "hand enabling it to do so." He also said (2): "I think the "charity ought not to lose its legacy because the Attorney-"General made, as I think he did, a slip in not raising or "asking the court to reserve the question when the matter "was on for further consideration, out of what fund these costs "ought ultimately to be paid." In the present case it is common ground that when the order of October 17, 1940, was made the master never intended to decide that the plaintiff's costs had priority over the trustees' remuneration. If he had so decided and there had been no appeal against the order, the registrar would, I think, have been wrong in making the order

---

(1) 45 Ch. D. 135. (2) Ibid. 137.

BENNETT J.

1942

City Housing Trust, Ld., *In re.* Kolb *v.* The Company.

which he did make. But the question never was decided and it is not too late now, the fund being in hand, to give effect to the trustees' rights. In my judgment, the registrar was right in making a provision which would give effect to the trustees' rights. His order, however, provides for the payment to the trustees of their remuneration from January 1, 1937, to December 31, 1941. I do not think that it would be right to make that order. It could not have been made by the master on October 17, 1940. He could only have made provision for payment of the remuneration then due. The trustees' remuneration is payable half-yearly and the provision for it ought to have been confined to their remuneration down to the half-year ending June 30, 1940. Therefore, there must be, I think, that variation in the registrar's order.

It will be varied by substituting "June 30, 1940" for "December 31, 1941" in the body of the order and making the corresponding alteration in the payment schedule. The costs of this motion will be costs in the action.

Solicitor for plaintiff: *W. F. Gillham.*
Solicitors for trustees: *Smiles & Co.*

K. R. A. H.

SIMONDS J.

1942

Feb. 24.

ROBINSON *v.* BAILEY.

Judgment—Enforcement—Charging order—Future liabilities—Discretion.

By an order made in a specific performance action the court directed that 50*l.* a year should be paid to the plaintiff by the defendant until the execution by the defendant of certain documents. The plaintiff obtained a charging order nisi against the defendant directing that, until the execution by him of the documents, 3333*l.* local loan stock, the property of the defendant, should stand charged with the payment of the 50*l.* a year:—

Held, that, although the court had jurisdiction to make the charging order, that jurisdiction ought to be exercised with the greatest care when it was intended to secure future payments and, particularly, when such payments were conditional on the continued life of the plaintiff, and that, in the present case, it would not be a proper exercise of the discretion to make a charging order locking up what appeared to be one of the defendant's substantial assets, if not the only one, to satisfy so small a debt.

Bagnall v. *Carlton* (1877) 6 Ch. D. 130 discussed.

PROCEDURE SUMMONS.

On February 25, 1941, the plaintiff, Lily Mary Robinson, obtained judgment against the defendant, William Lewis Bailey, in an action for specific performance. The order directed that the defendant should pay to the plaintiff 72*l.* by way of damages, an annual sum of 50*l.* by equal quarterly instalments, until the execution by the defendant of certain documents, and the taxed costs of the action. The defendant failed to pay these sums, with the result that, in December, 1941, 275*l.* 13*s.* had become due from him. On December 23, 1941, the plaintiff obtained an order charging 3333*l.* local loans stock, to which the defendant was entitled, with the payment of the 275*l.* 13*s.* That sum was paid, but the documents remained unexecuted. On January 14, 1942, before any further quarterly instalment of the 50*l.* a year had become due, the plaintiff obtained ex parte a second charging order in which it was ordered that the local loans stock, or, if sold, the proceeds of the sale, should, until the execution by the defendant of the documents, stand charged with the payment of the 50*l.* a year. On January 25, 1942, a quarterly instalment of 12*l.* 10*s.* became due and was paid. Under the usual provision contained in the charging order the defendant sought to show cause why it should not be made absolute and, by a procedure summons, applied to the court for its discharge.

F. C. Watmough for the defendant. A charging order cannot be made where no money is owing, nor can it be made except for a definite and ascertained sum. *Bagnall* v. *Carlton* (1) is the only authority for obtaining a charging order in respect of a debt before it becomes due. [He also referred to *Younghusband* v. *Gisborne* (2); *Wicks* v. *Shanks* (3); *Widgery* v. *Tepper* (4); and *Woodham Smith* v. *Edwards* (5).] Similarly in the Probate Division the court will not grant an injunction in a case of alimony pendente lite unless there is a sum fixed and due by some order of the court: see *Fanshawe* v. *Fanshawe* (6). It cannot be predicated here that any specific sum will ever become due. It would be monstrous if a debtor could be harassed by a charging order of this kind. Even if the court had jurisdiction to make such an order, it would refuse to do so in the circumstances of the present case.

---

(1) (1877) 6 Ch. D. 130, 132.
(2) (1847) 1 De G. & S. 209.
(3) (1892) 67 L. T. 609.
(4) (1877) 6 Ch. D. 364.
(5) [1908] 2 K. B. 899.
(6) [1927] P. 238.

Hewins for the plaintiff. The court has jurisdiction to make the order: *Bagnall* v. *Carlton* (1); *Younghusband* v. *Gisborne* (2); in the first of which cases the debt in respect of which the order was made was payable in the future; and it will do so in the present case as it is inconceivable that the defendant should be allowed to remain in a position in which he can dispose of his property and so render himself unable to discharge his debt to the plaintiff.

Watmough replied.

SIMONDS J. The question which I have to determine is whether or not a charging order should be made. It is to be observed that the order with which we are concerned was made, not in respect of any ascertained sum then due, but in respect of sums which might from time to time fall due. I say advisedly "might from time to time fall due," because the defendant's liability for those sums was conditional on the survivorship of the plaintiff. In view of the qualification that the debt would never mature unless the plaintiff lived to the date fixed for payment, it is not strictly accurate to say of any of these sums that it is even debitum in præsenti solvendum in futuro.

I should be bound, I think, on the authority of *Bagnall* v. *Carlton* (1), to hold that the court has jurisdiction to make a charging order in respect of a sum which is debitum in præsenti, although it is only solvendum in futuro. Bacon V.-C. expressed himself on that very question thus (1): "I entertain no doubt on this question. When the words of "the [Judgments Act] are considered, to say that it was the "intention of the legislature, after an order had been made "for payment, that the debtor should be allowed in the mean-"time to do what he pleased with the property which, in the "eye of the law, was the property of the creditor, would, "in my opinion, be against the plain enactment of the Act "of Parliament, and nothing could be more opposed to "common sense. I think the matter too plain for discussion, "and that there is no ground for this application", that being an application in which cause was shown against the order. The Vice-Chancellor goes on: "*Younghusband* v. *Gisborne* (2)

---

(1) 6 Ch. D. 130, 132. (2) 1 De G. & S. 209.

SIMONDS J.
1942
ROBINSON v. BAILEY.

"is a plain authority that there may be a charging order in "respect of a judgment debt made payable on a future day." If I may say so with the greatest respect to the Vice-Chancellor, I cannot help thinking that the language which he used is open to some criticism, for I find it difficult to suppose that it is an accurate statement of the law to say that where A. has recovered judgment against B., the property of B. is to be regarded in the eye of the law as that of A. However that may be, and although with deference I doubt whether *Younghusband* v. *Gisborne* (1) has quite the force which the Vice-Chancellor gives to it, I must, I think, in view of the time which has elapsed since the Vice-Chancellor delivered that judgment and of the fact that it has not been overruled or criticized, assume that the court has jurisdiction to make a charging order, notwithstanding that the judgment debt is not yet immediately payable. Nevertheless, that jurisdiction clearly must be exercised only with the greatest care when the charging order is intended to secure future payments, and particularly when such payments are conditional on the continued life of the judgment creditor, for a charging order of this kind is a form of execution and I know of no other kind of execution which is available in respect of a debt, judgment or otherwise, which is not immediately payable.

Assuming that I have a discretionary jurisdiction, but nevertheless must be guarded in exercising it, I have to consider whether I should exercise it here. I do not suppose that, if there were no other factors to be considered, it would be suggested that it would be a proper exercise of jurisdiction to make a charging order on a sum of local loans stock amounting to over 3000*l.* in respect of a small amount of 50*l.* a year payable by quarterly instalments. I cannot conceive that it would be proper for the court, by reason of an apprehended future failure of the defendant to satisfy the terms of the judgment, to lock up so disproportionate an amount of his property to satisfy so small a debt. It is, however, said that there are special circumstances arising out of the fact that the obligation to pay this sum is bound up with other terms and conditions. I do not think that these circumstances justify the order. Rather, I think, it may be said that the plaintiff is attempting to use this procedure to get a lever to force the defendant to comply with his obligation. That is not the way in which the plaintiff should proceed. She has

---

(1) 1 De G. & S. 209.

SIMONDS J.
1942
ROBINSON v. BAILEY.

her rights under the judgment, and can apply for the enforcement of its terms. Even at the date when the charging order was made by the master, correspondence was being conducted by the parties with regard to the implementing by the defendant of his obligation. It is quite true that he had expressed his doubts—it may be that he had gone further and asserted his inability—to fulfil the terms of the charge. Nevertheless, the matter was in negotiation. I see no reason why, in the exercise of the discretion which I have in this matter, I should lock up what appears to be one of the defendant's substantial assets, if not the only one, so that at some future date, if he fails to pay a quarterly instalment, this security should be available to the plaintiff.

In these circumstances the defendant succeeds in his application and the charging order will be discharged with costs.

Solicitors for defendant: *Zeffert, Heard & Morley Lawson.*
Solicitors for plaintiff: *C. Grobel, Son & Co.*

J. L. D.

SIMONDS J.
1942
Feb. 25, 26.

In re ARNOLD.

CALVERT *v.* WHELEN.

Administration — Deed of Covenant — Annuity — Future liability — Distribution of estate.

A testator executed deeds of covenant, by which he covenanted that after his death his legal personal representatives would pay certain annuities:—

Held, that, the future payment of the covenanted sums not being dependent on any contingency except the survivorship of the annuitants, the executors must not distribute the estate without retaining such a sum as, when invested, would produce an amount sufficient to satisfy the annuities.

In re Johnson [1940] W. N. 195 not followed.

ADJOURNED SUMMONS.

By nine deeds of covenant, executed in 1936 and 1938, the testator, Frank Thomas Arnold, entered into covenants that his legal personal representatives would after his death pay annuities amounting to a total of approximately 500*l.* By his will dated February 11, 1937, and several codicils the testator bequeathed legacies and annuities and devised and bequeathed the residue of his real and personal estate in manner therein mentioned. He died on September 24, 1940. A summons was taken out by the executors to determine (inter alia) whether or not they ought to complete the administration of the estate without retaining any part of it to meet any liability or possible liability under the deeds of covenant.

Winterbotham for the executors. The executors would appear to be entitled to distribute the estate without making provision for the annuities comprised in the deeds of covenant: *In re King* (1); *In re Johnson* (2).

Danckwerts for annuitants under the deeds of covenant.

Pascoe Hayward for an annuitant under the will.

Geoffrey Cross for a legatee.

Guest Mathews for the tenant for life of the residue.

SIMONDS J. The question is whether, in the administration of the estate of the testator, it would be proper for the estate to be distributed without provision being made for the payment of certain annuities. Such a course would be the cause of much confusion. It is true that the court will as a rule allow distribution without making provision for future contingent liabilities. That principle was stated and explained by Neville J. in *In re King* (1), and the practice was carried to its extreme limit in *In re Johnson* (2), where Crossman J. authorized the distribution of an estate without making provision for a future liability although it was not only possible but very probable. In that case there was no argument on behalf of the creditor, and I cannot help thinking that the learned judge may have been influenced by the fact that the residuary legatee, the King Edward Hospital Fund for London, could be presumed to be easily accessible and able to recoup any future liability. However that may be, I am satisfied that it would not be consistent with the practice of the court to adopt that procedure where there are covenanted sums the payment of which at a future date is not dependent on any contingency except the survivorship of the annuitants.

---

(1) [1907] 1 Ch. 72.

(2) [1940] W. N. 195.

SIMONDS J.
1942
ARNOLD, *In re.*
CALVERT *v.* WHELEN.

It would be wrong to leave creditors of an ascertained sum at a future date to recover from one or more of a number of legatees who might be called on to make good the deficiency the sum which might be then due from the estate. The proper course is to direct the trustees not to distribute the estate without retaining such a sum as, when invested, would produce the amount of the annuities which the testator had covenanted to pay.

Solicitors: *Sharpe, Pritchard & Co., for Foster, Calvert & Marriott, Norwich; Woodcock, Ryland & Co.; Withers & Co.*

J. L. D.

BENNETT J.
1942
Mar. 2.

In re GENERAL MORTGAGE SOCIETY (GREAT BRITAIN), LIMITED.

Company—Voting—Proxy—Winding-up—Scheme of arrangement with debenture holders—Meetings to approve scheme—Appointment of Official Receiver as proxy—Validity—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 153*—Companies (Winding-up) Rules,* 1929 (*St. R. & O.* 1929, *No.* 612), *r.* 150.

Meetings of three classes of debenture holders in an industrial and provident society which had been wound up by order of the court were ordered to be held to consider and vote on a scheme of arrangement under s. 153 of the Companies Act, 1929, between the society and its debenture holders:—

Held, that debenture holders were entitled under r. 150 of the Companies (Winding-up) Rules, 1929, to appoint the Official Receiver their proxy to vote at the meeting.

In re Madras Irrigation and Canal Co., Ld. [1881] W. N. 120 and *In re Central Bahia Railway Co., Ld.* (1902) 18 T. L. R. were decided under earlier and substantially different rules and are no longer of effect.

PETITION.

The petition was presented by the General Mortgage Society (Great Britain), Ld., a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, and in liquidation, and by John Barwick Thompson, the Official Receiver, asking that the sanction of the court be given to a scheme of arrangement between the society and its debenture holders. The society, which was incorporated in 1931, was ordered by the court to be wound up on October 18, 1937, and J. B. Thompson, the Official Receiver, was appointed liquidator. The issued capital of the society consisted of 1329*l.* 5*s.* in ordinary shares, and it had also issued debentures of three series, namely, A, B and C, to the amount of 55,000*l.*, held by three classes of debenture holders claiming different priorities. The fund available for distribution among the debenture holders was 1250*l.*, and, as it was found that it would be difficult to determine these priorities and the expense of further litigation would be involved, a scheme of arrangement was settled, and meetings of the A, B and C debenture holders were ordered to be convened to consider, and, if thought fit, to approve it. The scheme was approved by the class meetings with only one dissentient. On the petition coming before the registrar, he took the objection that a number of debenture holders had appointed the Official Receiver their proxy.

H. E. Salt for the Official Receiver. The doubt of the registrar has arisen from the decisions in *In re Madras Irrigation and Canal Co., Ld.* (1) and *In re Central Bahia Railway Co., Ld.* (2), where it was held that only a creditor or contributory of the same class could be a proxy for a creditor or contributor at a meeting convened by the court. The registrar, therefore, took the view that the Official Receiver, not being a member of any of the classes of debenture holders, could not be appointed as proxy by any debenture holder. That was so under r. 46 of the General Order, 1862, under the Companies Act, 1862, but that rule has been annulled since 1903, and under r. 150 of the Companies (Winding-Up) Rules, 1929, there is express power to appoint the Official Receiver a proxy.

BENNETT J. In my judgment, having regard to the rules as they now stand, the decisions of Sir George Jessel M.R. in *In re Madras Irrigation and Canal Co., Ld.* (1), and of Buckley J. in *In re Central Bahia Railway Co., Ld.* (2), are no longer of any effect. In 1881 when Sir George Jessel M.R. decided that for the purposes of the meeting of any particular class of persons, proxies could only be given to and held by members of that class, and that a proxy given to the official liquidator was, therefore, invalid, and in 1902, when Buckley J. followed that decision, the winding-up rule in force was r. 46 of the General Order of the Court

(1) [1881] W. N. 120.

(2) (1902) 18 T. L. R. 503.

of Chancery, 1862, a rule which provided that "The votes "of the creditors or contributories of the company at any "meeting summoned by the direction of the judge, may be "given either personally or by proxy, but no creditor shall "appoint a proxy who is not a creditor of the company whose "debt or claim has been allowed, and no contributory shall "appoint a proxy who is not a contributory of the company." Since then the General Order, 1862, has been annulled by the Companies (Winding-up) Rules, 1903, and in their place there are now the Companies (Winding-up) Rules, 1929. Rule 150 of those rules is as follows: "A creditor or contributory in "a winding-up by the court may appoint the Official Receiver "or Liquidator and in a voluntary winding-up the liquidator "or if there is no liquidator the chairman of the meeting, to "act as his general or special proxy." It seems to me plain, therefore, that at meetings such as these convened by the order of the court in the case of a company which is being wound up by order of the court, the creditors have the right to appoint as their proxy the Official Receiver. Therefore, the suggestion that these proxies were invalid is unfounded. The scheme will be sanctioned.

Solicitors: *Stafford Clark & Co.*

H. L. L.

BENNETT J.
1942
Mar. 11, 12.

BOWRING-HANBURY'S TRUSTEE *v.* BOWRING-HANBURY.

Limitation of action—Debt—Acknowledgment—Administration—Payment of debts—Executor also creditor—Probate affidavit by executor showing debt due to him—Bankruptcy of executor—Statement of assets—Inclusion of debt—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

A creditor, who was the sole executor of the will of his wife, stated, in an Inland Revenue affidavit made by him to obtain probate, that the list of debts included a sum of 9000*l.* due to him, representing the balance of loans made by him to his wife. He became bankrupt in 1935 and the solicitors acting for him as executor of his wife's estate sent to his trustee in bankruptcy a letter enclosing a copy of the executor's cash account and an estimate of the outstanding assets and liabilities. A note was appended to this document stating that "in addition to the "above outstanding liabilities there is a possible claim by [the "executor] for 9000*l*., the balance of a loan he made to the "deceased in 1924":—

Held, that neither the statement in the affidavit nor the note to the estimate constituted an acknowledgment of the debt so as to prevent it from being barred by the Statute of Limitations.

In re Beavan [1912] 1 Ch. 196 applied.

WITNESS ACTION.

The testatrix, Ellen Bowring-Hanbury, who died on March 17, 1931, by her will, dated October 16, 1918, appointed her husband, Victor Henry Bowring-Hanbury, sole executor and devised and bequeathed to him the residue of her estate. On May 4, 1931, the executor, to obtain probate, swore an Inland Revenue affidavit, in which there appeared in the list of debts the following item: "balance due to Mr. Bowring-Hanbury "of loans made by him 9000*l*." This sum was in respect of a loan of 10,000*l*. made by him to his wife in December, 1924, of which 1000*l*. had been repaid by her in June, 1929. On March 14, 1935, the executor was adjudicated bankrupt and the unpaid balance of the debt thereupon became vested in his trustee in bankruptcy. In June, 1936, a letter was written to the trustee by the solicitors of the executor in which they enclosed a copy of the executor's cash account and an estimate of the outstanding assets and liabilities of the estate. At the foot of the latter document the following note appeared: "In addition to the above . . . . there is a possible claim by "Mr. Bowring-Hanbury for 9000*l*., the balance of a loan of "10,000*l*. he made to the deceased in 1924." In July, 1936, an action was commenced by the trustee against the executor as executor of the will of his wife to recover from her estate the balance of the debt.

Vaisey K.C. and *Sir George Jones* for the trustee. The trustee claims to be entitled to this sum as a creditor. The question is whether the reference to the debt in the affidavit amounts to an acknowledgment of the debt and takes the case out of the Statute of Limitations, and also whether the note to the estimate of outstanding liabilities amounts to an acknowledgment of the debt for the same purpose. An acknowledgment must be made to the creditor: see *In re Beavan* (1); *Stamford, Spalding and Boston Banking Co.* v. *Smith* (2). Nothing is said in the statute about an acknowledgment, but it was early held that a recognition of the debt

(1) [1912] 1 Ch. 196, 205.

(2) [1892] 1 Q. B. 765.

amounted to an acknowledgment. In this case the executor makes an acknowledgment in the capacity of both debtor and creditor. In *In re Beavan* (1) Neville J. doubted *In re Emmett* (2). In *Tanner* v. *Smart* (3) it is shown that the acknowledgment of a debt must be in such terms as to amount to a promise to pay, or the debt will be barred by the statute. Here it is possible to spell out a promise that the defendant, as executor, will pay himself out of this estate. They referred to *Spencer* v. *Hemmerde* (4). A person can make an acknowledgment to himself. It cannot be right to say that in the circumstances this debt is statute barred.

Wynn Parry K.C. and *Herbert Malone* for the executor. There is not a sufficient acknowledgment to take the debt out of the Statute of Limitations. An acknowledgment of the debt must be given to the other party to the original transaction, that is, to the creditor, his agent, or some other person entitled to the payment. The promise to the Inland Revenue was not an acknowledgment of this debt. [They referred to *Stamford Spalding and Boston Banking Co.* v. *Smith* (5) and to *In re Beavan* (1).]

BENNETT J. In answer to the claim endorsed on the writ the executor pleads that the debt which is sued for is barred by the Statute of Limitations. The question is whether either the inclusion in the Inland Revenue affidavit, which the defendant swore as executor of his wife, of the debt due to himself from his wife as one of his wife's debts or the note at the foot of the estimate of outstanding assets and liabilities sent by the executor's solicitors to the trustee in bankruptcy in June, 1936, is an acknowledgment of the debt sufficient to take the case out of the statute.

It is now settled law that, to be sufficient to take the debt out of the statute, an acknowledgment—which under Lord Tenterden's Act must be in writing—must be a clear unconditional acknowledgment. From such an acknowledgment the law will imply a promise by the debtor to pay. The question here, in regard to the inclusion of the debt in the Inland Revenue affidavit, is whether that can be regarded as an acknowledgment at all, the statement in the Inland Revenue affidavit not being an acknowledgment of anything to anybody

(1) [1912] 1 Ch. 196, 205.
(2) (1906) 95 L. T. 755.
(3) (1827) 6 B. & C. 603.
(4) [1922] 2 A. C. 507.
(5) [1892] 1 Q. B. 765.

but a mere statement of facts on oath to a division of the High Court of Justice made to obtain a grant of probate. The decision in *In re Beavan* (1) is an authority in favour of the executor, unless it can be said that a man can make a promise to himself, because in that case Neville J. decided that an affidavit made by two executors, in which they included as one of the debts of the testator a debt which was statute barred, was not a sufficient acknowledgment, because the acknowledgment was made to the court and to nobody else and what the law required was an acknowledgment made to the creditor or to the creditor's agent. It was argued that the present case is distinguishable from *In re Beavan* (1) because the creditor is also the executor of his wife, who was the debtor, and that he must be taken, in his capacity as executor of his wife, to have made a promise to himself as a creditor of his wife's estate to pay this outstanding debt. The answer to that, in my judgment, is that a person, when deposing to an Inland Revenue affidavit, never has in mind the making of any promise to anyone about anything. He is simply making a statement to obtain from the court a grant of probate, and a statement made in those circumstances is not one in which, in my judgment, it is possible in law to imply a promise at all. For these reasons, in my view, the Inland Revenue affidavit is not a sufficient acknowledgment (or indeed an acknowledgment at all) for the purpose of defeating the operation of the Statute of Limitations.

So far as the note to the estimate of outstanding assets and liabilities is concerned, that, too, fails as an acknowledgment because it is not made to the creditor. The document was sent by the solicitors for the executor to the trustee in bankruptcy, solely to inform the trustee of the position of the estate of the testatrix and it is plain from the words used that, when the note was appended to the foot of the statement, there was no intention of acknowledging the existence of a debt.

In my opinion, the defence of the Statute of Limitations has been established and the action must be dismissed with costs.

Solicitors: *Woolfe & Woolfe; Hopgood & Co.*

J. L. D.

---

(1) [1912] 1 Ch. 196.

FARWELL J.

1942 Mar. 16.

LANE *v.* MINISTER OF WAR TRANSPORT.

Emergency legislation—Requisition—Vehicle—Hire of lorry on behalf of Crown—Right to terminate hire at any time—Requisition of lorry—Validity—Defence (*General*) *Regulations, reg.* 53.

A contract for the hire of a motor lorry at a daily rate of pay was entered into between the Minister of War Transport and the owner, power being reserved to determine the contract at any time. While the contract for hire was subsisting, the competent authority requisitioned the lorry on behalf of the Minister under reg. 53 of the Defence (General) Regulations:—

Held, that the requisition notice determined the contract of hire, and was validly given.

ADJOURNED SUMMONS.

The summons was taken out by the plaintiff, Robert Lane, against the Minister of War Transport, to determine whether the Minister had at any time, by virtue of reg. 53 of the Defence Regulations, 1939, or at all, power to requisition and/or to acquire a motor vehicle Y.G. 5340, the property of the plaintiff, when at all material times the said vehicle was in the possession and/or power of the Minister, his servants or agents under a contract of hire entered into between the plaintiff and the Minister. The plaintiff sought a declaration that the Minister was not empowered to requisition and/or to acquire the vehicle.

The plaintiff carried on business in Yorkshire as a haulage contractor, and on or about May 30, 1940, the county council of the North Riding of Yorkshire, acting for and on behalf of the Minister, hired his motor lorry for a continuous period commencing on that date at the rate of 1*l*. per day. The terms of the contract of hiring were contained in telephone conversations between the plaintiff and an official of the council and confirmed by the council in a written order, dated May 30, 1940, in the following terms: "I shall be glad if you "will haul . . . . as and when required tons of gravel, "etc., at the rate of tons per day. This work is to be "undertaken at day rates from May 30 and . . . . is offered "subject to the conditions contained in your accepted tender "for haulage, and on the understanding that the county council "reserves the right to terminate your employment under this "haulage order at any time." As from May 30, 1940, therefore, the lorry was in possession of the Crown acting through its proper officer, and the plaintiff was being paid at the rate provided by the contract. The plaintiff never received any express notice, oral or written, from the county council, or from the Minister, to terminate the hiring of the lorry. On or about March 28, 1941, he received a notice of that date from the Regional Transport Commissioner purporting to requisition the lorry on behalf of the Minister. The notice which was headed, " Requisition of vehicles," and was addressed to the plaintiff and signed by the chief assistant to the Road Transport Commissioner, was in these terms: "I, an officer authorized by the Minister of Transport in that "behalf, hereby requisition the under-mentioned vehicle and "equipment for use of the Ministry of Transport."

G. R. F. Morris for the plaintiff. The contract provides that the Minister, through his agent, may terminate it at any time. There has been no termination and the notice of requisition is, therefore, bad. It is submitted that the Crown cannot requisition property in respect of which a contract of hiring is subsisting between the owner and the Crown.

Sir Donald Somervell A.-G. and *Danckwerts* for the Minister. The contention that there has been no termination of the contract is ill-founded. The notice to requisition is in itself a notice to terminate the hiring, and once that notice has been given, the contract is at an end. The Crown's power of requisition cannot be limited in the manner suggested, and the only question on which the plaintiff is entitled to be heard is whether he has or has not suffered damage.

FARWELL J. It is contended on behalf of the plaintiff that the Crown was not entitled to serve the notice which it did serve to requisition the vehicle, because at the date when the notice was served the vehicle was already in the possession of the Crown under the hiring agreement which had never been terminated, and, therefore, the power which is given to the Crown to requisition vehicles could never come into force, the very object of requisitioning the vehicle having already been achieved under the hiring agreement. Further, it was said that in any event no notice had been given by the Crown to the plaintiff to terminate the agreement, and, therefore, the Crown could not requisition the vehicle because at the time the agreement under which the Crown had acquired the use of the vehicle was in existence.

The power which the Crown purported to exercise, and which it claims it rightly exercised, was conferred upon it by reg. 53 of the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Act, 1939, which provides: "(1.) Subject as hereinafter provided, a competent "authority, if it appears to that authority to be necessary or "expedient so to do in the interests of the public safety, the "defence of the realm or the efficient prosecution of the war, "or for maintaining supplies and services essential to the life "of the community, may requisition (*a*) any chattel in the "United Kingdom . . . . and may give such directions as "appear to the competent authority to be necessary or "expedient in connection with the requisition." "(2.) . . . . "Where a notice of acquisition is served under this paragraph "on the owner of any . . . . vehicle . . . . then, at the "beginning of the day on which the notice is served,—(*a*) the " . . . . vehicle . . . . shall vest in the competent authority "free from any mortgage, pledge, lien or other similar obligation; and (*b*) the period of the requisition thereof shall end." It is well to see what is the definition of "requisition" contained in the Compensation (Defence) Act, 1939, by s. 17 of which it is provided: "'Requisition' means, in relation to any property "take possession of the property or require the property to "be placed at the disposal of the requisitioning authority." Therefore, what the Crown has done or has purported to do, is to requisition this vehicle and thereby to take possession of it or to require the property to be placed at the disposal of the requisitioning authority.

It is said that the Crown has no power to do that where the vehicle requisitioned is already in its possession under an existing agreement of hire. If the Crown's power to requisition is limited, it must be limited either by something in the Emergency Powers (Defence) Act, 1939, or by something in the regulations, but I am unable to see that there is anything which prevents the Crown from taking the step which it has taken in this case. It is said that, if the hiring agreement was still in existence when the notice of requisition was given, the notice cannot be good because it would be a breach of the hiring agreement already entered into between the Crown and the owner of the vehicle. That might be the position in another case where the agreement contained some provision as to the length of notice required, but that does not arise here and it is not a matter which I think I need or ought to

FARWELL
J.
1942
LANE
v.
MINISTER
OF
WAR
TRANSPORT.

consider. The position here is that the contract provides that the agreement can be terminated at any time. In my judgment, the notice to requisition the vehicle was in itself notice to determine the hiring agreement. It is also contended that the Crown, through its proper officer, ought to have given notice to determine immediately before the requisition notice was served on the plaintiff, but I cannot see that there can be any difference between telephoning five minutes before the notice is served and stating that the hiring agreement is at an end and the serving of the requisition which, in my judgment, in itself operated as a notice of termination of the hiring agreement.

In my judgment, therefore, the plaintiff is not entitled to the relief which he is seeking, and, the summons must be dismissed with costs.

Solicitors: *Mawby, Barrie & Letts*; *Treasury Solicitor.*

H. L. L.

Applied. *Re* HAYNES' WILL TRUSTS.
[1948] 2 All E.R. 423.

In re DENNIS'S SETTLEMENT TRUSTS.

Followed. *Re* HAYNES.
[1949] 1 Ch. 5

DENNIS *v.* DENNIS.

FARWELL
J.
1942
Mar. 20.

Settlement—Construction—Protective life interest—Forfeiture clause—Subsequent deed varying trusts of settlement—Income payable to beneficiary limited to 1000*l.*—*Contingent interest in capital and accumulations—Vested interest in persons entitled in remainder.*

By a settlement made in 1923 by a father in favour of his son, then under age, the trustees were directed to hold the stocks and securities transferred to them on protective trusts for the benefit of the son, that is, to pay or apply the income to or for the benefit of the son during his life until any act or event should happen whereby the income would, if belonging to him absolutely, become vested in or charged in favour of some other person or persons. The trustees applied part of the income towards the maintenance and education of the son, and accumulated the balance. In 1935 the son attained the age of 21, and a supplemental deed was then entered into between the parties, by which it was provided (inter alia) that for the following six years the trustees should pay to or apply for the benefit of the son not more than 1000*l.* a year out of the income and should accumulate and invest the balance and hold the capital of the fund including all accumulations of surplus income in trust for the son if he should be living at the expiration of the six years and if no such act or event should have happened as aforesaid, and, subject thereto, on the trusts provided by the principal settlement in the event of the son's death or the happening of any act or event by which the income should be vested in or charged in favour of some other person :—

Held, that the effect of the supplemental deed was to vest the right to receive part of the income, subject to a contingency, in some person other than the son, and, therefore, it brought the forfeiture clause in the principal deed into operation.

Adjourned Summons.

By a settlement dated February 28, 1923, and made between the settlor, Robert Howard Dennis senior, of the one part, and the trustees, John William Dennis, Frank Whitworth Dennis, and Howard George Frank, of the other part, after reciting the transfer of certain stocks and securities into the names of the trustees, it was provided that they should stand possessed of the capital and income of the trust funds on trust to pay the income thereof or to apply the same for the son of the settlor, Robert Howard Dennis junior, during his life until any act or event should happen, either before or after the death of the settlor, whereby the income of the trust funds would, if belonging to the son absolutely, become vested in or charged in favour of some other person or persons or corporation, and thereupon the trustees should retain the income during the life of the son on certain protective trusts for the benefit of the son and any person who, if he were dead, would be entitled under the trusts of the settlement, and subject thereto the capital and so much of the income as should not have been so applied or disposed of by the trustees and the income of any part which should have been invested and held on the like trusts were to be held by the trustees in trust for the children of the son at twenty-one or marriage as he should by deed or will appoint, and, in default of and subject to any such appointment, equally between such children with a gift over in default of children in favour of Gwendoline Joan Dennis, the daughter of the settlor, and her children. The son attained the age of twenty-one on February 8, 1935, and was a bachelor. Gwendoline Joan Dennis was married and had infant children.

By a deed of release and confirmation of settlement made on July 7, 1935, between the settlor, the son, and the trustees, and supplemental to the principal settlement, after recitals stating that new trustees had been appointed, that the original trustees had applied part of the income of the trust fund for

FARWELL J.
1942
DENNIS'S SETTLEMENT TRUSTS, *In re.*
DENNIS *v.* DENNIS.

the maintenance and education of the son, and had accumulated and invested the balance of the income and that doubts had arisen whether or not the son was entitled to receive the accumulations of surplus income and that it was desired to resolve these doubts, it was agreed and declared that the whole of the stocks, shares and securities set out in the schedule thereto representing the investments of accumulated income, and a further amount of conversion loan added by the settlor were to be deemed and applied as capital moneys under the trusts of the principal settlement. It was further agreed by cl. 3 of the deed that as from February 8, 1935, to February 8, 1941, the trustees should not pay to the son, if he should so long live, the whole of the income of the trust funds in the schedule, but in lieu thereof should pay to him according to the same conditions as aforesaid the yearly sum of 1000*l.*, and should accumulate and invest the remainder of the income, and on February 8, 1941, should pay and transfer to the son, if then living and no such act or event as aforesaid should have happened, the said sum of conversion loan "or any "moneys or investments thereof representing the same and "the whole of such remainder including all accumulations "thereof." Subject thereto, the trustees were to hold such remainder and the conversion loan on the trusts provided by the principal settlement with regard to the capital and income of the trust funds in the event of the death of the son or the happening of any such act or event as aforesaid. The deed also contained a release by the son of the trustees from any claim which he might have had but for the deed to receive the income of the trust fund so far as it had not been received by him, and from any breach of trust which might have been unwittingly committed by the trustees.

The question raised by the summons was whether the execution of the deed of July 7, 1935, operated to bring about a forfeiture of the interest of the son in the moneys settled by the original settlement.

Wilfrid Hunt for the trustees.

Droop for the son. There has been no forfeiture. The language of the forfeiture clause is not nearly so wide as usual. It refers to an act or event by which the income of the trust funds may become vested or charged in favour of another person. That means the whole income, and it does not come into effect if only a proportion of the income is diverted. The words "or become payable to" which usually follow "vested "in" in such a clause are omitted. There is under this deed no transfer to any person as a beneficiary, but only a transfer to trustees. If the personal receipt of the income does not pass to another person there is no forfeiture: *In re Brewer's Settlement* (1). The words in a forfeiture clause are to be strictly construed and cannot be added to in any way: see *In re Baring's Settlement Trusts* (2) and *In re Salting* (3).

Pascoe Hayward (for *Harold Brown*) for infant defendants. Clause 2 of the principal settlement which creates the protected life interest, subject to forfeiture, must be read as "income or "any part thereof," otherwise any part might be lost by degrees. I concede that as the words "or become payable "to" are not in this clause, the decision in *In re Salting* (3) does not apply, but the effect of the deed of 1935 was to give the son a contingent interest only in the accumulations and to assign the vested interest in remainder subject to the contingency of his being alive and in receipt of the income in 1941. The remainder is vested in the persons who would be entitled on his death.

Farwell J. The question is whether the deed of July 7, 1935, operated to bring about a forfeiture of the son's interest in the sums dealt with under the original deed, and to determine that question the forfeiture clause in the original deed must be considered. As has been pointed out, it is in narrower terms than are often found in a forfeiture clause. It does not include any such words as "the personal enjoyment of the "income." In my judgment, it is not possible for the court to supply words in a forfeiture clause in an instrument of this kind. That seems to be the effect of the judgment, in *In re Brewer's Settlement* (1), of Chitty J., who said: "In construing clauses of cesser or forfeiture such as that "before me, the court is not at liberty to depart from the "language of the document. The words 'or cease to be "'payable to himself' are not in the settlement; and I find "myself unable to say that, by any just method of construction "applicable to such clauses, I ought to supply those words." Therefore, in my opinion, I am bound to construe the words which are actually used in this forfeiture clause and not to extend them or to read into the clause words which are not there.

---

(1) [1896] 2 Ch. 503, 507.
(2) [1940] Ch. 737.
(3) [1932] 2 Ch. 57.

It was contended that, as the wording of the clause was: "whereby the income of the trust funds would, if belonging "to the son absolutely, become vested in or charged in favour "of some other person or persons or corporation," and not: "whereby the income or any part thereof," the clause must be read as though it only took effect in the event of the whole of the income being vested in or charged in favour of some other person or persons. I am not able to adopt that view. In my opinion, it is clearly intended that the forfeiture is to take effect if any part of the income becomes vested in or charged in favour of some other person or persons.

It is plain that the supplemental deed has not the effect of charging the income or any part of it in favour of any other person or persons, but the question is whether it operated so that part of the income vested in some other person or persons. That depends on the true construction of cl. 3 of the supplemental deed. In my judgment, the result of that clause is that the income of the accumulations is part of the income of the fund. The son gets an interest in that money contingent on his being alive in 1941 and no event having happened before that date which would amount to a forfeiture. It is said that the effect of the supplemental deed is that he remains the only person who has an interest in the income, and that, therefore, the forfeiture clause never comes into operation at all. In my opinion, that is not the effect of the supplemental deed. Its effect is to give the son only a contingent interest in part of the income, with the result that that part of the income is vested, subject to that contingency, in some person or persons other than the son. Accordingly, in my judgment, the true effect of these two documents is that there has been a forfeiture of the interest of Robert Howard Dennis junior.

Solicitors: *Ellis, Munday & Clarke.*

H. L. L.

SIMONDS J.

1942
Mar. 24.

In re OGILBY.

OGILBY *v.* WENTWORTH-STANLEY.

Administration—Intestacy—" Personal chattels "—Chattels not used for business purposes—Cattle on farm—Farm not carried on at a profit—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1; *s.* 55, *sub-s.* 1 (*x*).

A herd of shorthorn cattle on a farm belonging to an intestate which was not worked at a profit were claimed by the intestate's husband to be "personal chattels" within the meaning of s. 46, sub-s. 1, and s. 55, sub-s. 1 (x), of the Administration of Estates Act, 1925, as being chattels not used for business purposes:—

Held, that, although the farm was not worked at a profit, it was nevertheless a business, and that the cattle were "used for "business purposes."

ADJOURNED SUMMONS.

The summons was taken out by Colonel Robert James Leslie Ogilby, the surviving husband of Mrs. Isabel Katherine Ogilby, who died intestate on October 16, 1940. Colonel Ogilby claimed, as against the children of the intestate by a former marriage, that a herd of shorthorn cattle and other live and dead stock on a farm belonging to the intestate were "personal chattels" within s. 46, sub-s. 1, and s. 55, sub-s. 1 (x), of the Administration of Estates Act, 1925, as being chattels not used for business purposes (1).

The intestate's first husband, the Reverend Charles Henry Brocklebank, was interested in the breeding of shorthorn cattle. In 1925 he moved to Westwood Park, West Bergholt,

---

(1) By Administration of Estates Act, 1925, s. 46, sub-s. 1: "The residuary estate of an "intestate shall be distributed "in the manner or be held on "the trusts mentioned in this "section, namely:—(i.) If the "intestate leaves a husband or "wife (with or without issue) the "surviving husband or wife shall "take the personal chattels "absolutely . . . ."

By s. 55, sub-s. 1 (x): "'Per-"'sonal chattels' mean carriages, "horses, stable furniture and "effects (not used for business "purposes), motor cars and access-"ories (not used for business "purposes), garden effects, domes-"tic animals, plate, plated articles, "linen, china, glass, books, pic-"tures, prints, furniture, jewellery, "articles of household or personal "use or ornament, musical and "scientific instruments and ap-"paratus, wines, liquors and con-"sumable stores, but do not "include any chattels used at the "death of the intestate for busi-"ness purposes nor money or "securities for money."

Essex, where there was a large residence with pleasure grounds, and, in addition, a home farm of 135 acres or thereabouts of pasture land, plantation and workmen's cottages. There was also a small holding known as Spring Farm, which included a dwelling house, a barn, and 44½ acres arable and pasture land, which was purchased by Mr. Brocklebank at a later date. There he carried on the breeding of shorthorn cattle with other incidents of farming which could usefully be carried on therewith. He died in 1935 and his herd was disposed of. After an interval the intestate, who later married Colonel Ogilby, herself took up the business of breeding shorthorn cattle, and she carried on that business until her death, consistently making no profit but a loss. The only question argued on the summons was whether the herd of shorthorn cattle was or was not used for business purposes.

Heckscher for Colonel Ogilby.
G. D. Johnston for a daughter of the intestate.
Wilfrid Hunt for infant children of the intestate.

SIMONDS J. Colonel Ogilby contends that the intestate carried on the breeding of cattle not as a business, because she consistently made a loss, but as a hobby. I am wholly unable to follow that argument. According to the ordinary use of the English language, the intestate carried on the business of a farm at Westwood Park and on the adjoining small holding, known as Spring Farm, and the live and the dead stock which she used for that purpose she used for the business of farming. It seems to me to be impossible to say that, in those circumstances, the live stock, including the cattle in question, and the dead stock, were not used for business purposes by her at her death, within the meaning of the Administration of Estates Act, 1925. It may be right to say that a person who keeps a cow or a pig or some other domestic animal purely for his own use does not do so for business purposes. It may sometimes be difficult to draw the line, but where you find farming on this scale, a home farm with a substantial acreage and live and dead stock valued for the purpose of probate at between 1400*l.* and 1500*l.*, including thirty-one head of cattle and thirty-five head of sheep, there is no doubt on which side of the line the case falls. There is a farming business being carried on and the live and the dead stock are being used for the purpose of that business.

SIMONDS J.
1942
OGILBY, *In re.* OGILBY *v* WENTWORTH-STANLEY.

My attention has been called to a number of cases in which the word "business" has been used, but I have to consider the word in the context in which I find it, and whether or not, for the purpose of the Bankruptcy Acts, the intestate might be said to be carrying on a business is, I think, neither here nor there. It is, perhaps, relevant that during the intestate's lifetime, whether for the purpose of income tax or for that of rating, she claimed to be in occupation of the land which she farmed for the purpose of husbandry, and that she was carrying on a business in respect of which she was entitled to relief.

The substantial question is simply one of the interpretation of the words in s. 55, sub-s. 1 (x), of the Administration of Estates Act, 1925. Accordingly, I answer the first question by saying that Colonel Ogilby is not entitled to any of the items enumerated which were in or on the home farm, unless, indeed, there are included among those items some implements which can be called garden implements within the meaning of the section.

Solicitors: *Mount, Sterry & Co : Frere, Chomeley & Co.; Kenneth Brown, Baker, Baker.*

H. L. L.

BENNETT J.
1942
Feb. 24, 25, 26.

MEYE AND ANOTHER *v.* ELECTRIC TRANSMISSION, LIMITED.

Landlord and tenant—Tenancy—Tenancy at will—Holding over—Emergency legislation—War damage—Notice of disclaimer—Tenant remains as a trespasser—Acquiescence by lessor.

In September, 1940, premises of which the defendant company was lessee under an underlease granted by the plaintiffs were damaged by enemy action, and on October 12, 1940, notice of disclaimer of the lease was served on the plaintiffs on behalf of the company. The company, however, did not vacate the premises in accordance with the notice and, on October 18, 1940, the plaintiffs' solicitors informed the company's solicitors that as from the date of the notice the company was a trespasser and liable for mesne profits. On November 4, 1940, after correspondence had been going on for some weeks, the plaintiffs' solicitors wrote to the company's solicitors telling them what course of action the company ought to take to get the premises repaired. When a quarter's rent became due at Christmas, 1940, the company did not pay it, and in February, 1941, the company vacated the premises. In an action by the plaintiffs for rent on the ground that, as from the service of the notice of disclaimer, the company was a tenant from year to year or a tenant at will :—

Held, that the company was a tenant at will.

Dougal v. *McCarthy* [1893] 1 Q. B. 736 distinguished.

WITNESS ACTION.

By an underlease dated January 8, 1930, the plaintiffs, the lessors, demised premises to the defendant company for twenty-one years from December 25, 1929, at a yearly rent of 375*l*. On September 23, 1940, the premises were damaged by enemy action, and on October 12, 1940, the company, by its solicitors, served on the lessors notice of disclaimer of the lease which thereupon, by s. 8, sub-s. 2, of the Landlord and Tenant (War Damage) Act, 1939, was to be deemed to have been surrendered. On October 18, 1940, the plaintiffs' solicitors wrote to the company's solicitors: "We gather "that your clients have not vacated the premises in accordance "with their notice of disclaimer so that, as from the date of "the notice, they have been in the position of trespassers "and liable for mesne profits." On October 22, 1940, the company's solicitors replied: "We think that the best course "is for our clients to remain in as trespassers and be liable "for mesne profits." On October 25, 1940, an officer of the local authority wrote to the company stating that a surveyor had reported that considerable repairs were needed. That letter was sent on to the plaintiff, Meye, who then wrote to the company's secretary expressing the view that the parties would be able to come to a settlement within the next few days. On November 4, 1940, the plaintiffs' solicitors wrote to the company's solicitors: "The borough council . . . . "state that, if you are engaged on work of national importance, "it will be necessary for you to obtain . . . . a certificate to "that effect, and that restoration of the premises is essential "in the national interest." On December 31, 1940, the plaintiff, Meye, demanded the quarter's rent due on December 25, 1940, and the company's secretary told him that the company was a trespasser and liable only for mesne profits. On February 28, 1941, the company vacated the premises. By this action the plaintiffs claimed alternative declarations that, from October 13, 1940, the company was a tenant from year to year or a tenant at will, and rent from September 29, 1940, to February 28, 1941.

Newsom for the plaintiffs. From the demand for rent by the plaintiff, Meye, on December 31, 1940, the court can construe an agreement between the parties: *Dougal* v. *McCarthy* (1). The company was a tenant from year to year from the date of the notice of the disclaimer. If it was not, it was a tenant at will from that date, and in any case it must pay a proper rent for the period during which it remained in possession of the premises.

Daynes K.C. and *C. A. J. Bonner* for the company. The effect of the notice of disclaimer was that the company surrendered the underlease: Landlord and Tenant (War Damage) Act, 1939, s. 8, sub-s. 2. Thus, while admittedly liable for rent from September 29, 1940, to October 12, 1940, from October 13, 1940, to February 28, 1941, the company was simply a trespasser and liable for mesne profits. It appears to be contended that the company is to be treated as holding over and becoming a tenant from year to year. If that contention be well founded, a tenant serving a notice of disclaimer under the Act incurs a very great risk. [They referred to *Doe d. Murrell* v. *Milward* (2); *Cole* v. *Kelly* (3); *Dunlop* v. *Macedo* (4); *Elliott* v. *Boynton* (5); Foa on the Law of Landlord and Tenant, 6th ed., p. 446; Woodfall on the Law of Landlord and Tenant, 24th ed., p. 272; *Sloper* v. *Saunders* (6); and *Right* v. *Darby* (7).]

Newsom replied.

BENNETT J. Although the lease was deemed to have been surrendered, on October 12, 1940, after the letter of November 4 from the lessors' solicitors to the company's solicitors, both the plaintiffs and the company were clearly willing that the company should remain in occupation of the premises on the footing that it was a trespasser and should pay for its use and occupation such a sum as a court would award that a trespasser should pay. Paradoxical as it may seem, in my judgment those letters created a contractual relationship of landlord and tenant, the tenancy being a tenancy at will and the rent being equivalent to the sum which would be awarded as mesne profits.

Mr. Newsom, for the plaintiffs, founded his argument that there was a tenancy from year to year on *Dougal* v. *McCarthy* (1). In that case the agreement was for a tenancy for one year from February 1, 1891, at a rent of 140*l.* payable by four equal quarterly payments in advance on February 14, May 14, August 14 and November 14. At January 31, 1892, the tenants remained in occupation, and on February 25, 1892, the landlord asked for a cheque for 35*l.*, "for a quarter's rent "due on the 1st instant." It was not due on the 1st instant and could have been due only on the 14th instant, but he was writing for a cheque in respect of a period following the end of the period fixed by the agreement, and was clearly recognizing the relationship of landlord and tenant. On March 25, 1892, the secretary to the tenants wrote: " . . . . "it is their [the tenants'] intention to discontinue their present "tenancy . . . . and . . . . they will not continue same "beyond the period required under their agreement." There, again, the defendants clearly recognized the existence of a tenancy after the expiration of the original term, and the court had to determine the nature of the tenancy. That was the whole point of the case, and the Court of Appeal, founding on the decision of Lord Mansfield C.J. in *Right* v. *Darby* (2), held that the tenancy was from year to year. Lord Esher M.R. said (3): "I take it that the doctrine laid down by Lord "Mansfield in *Right* v. *Darby* (2) is correct. He there said (4): "'If there be a lease for a year, and by consent of both parties "'the tenant continue in possession afterwards, the law "'implies a tacit renovation of the contract. They are "'supposed to have renewed the old agreement, which was "'to hold for a year.' Here there is the landlord's consent, "and the fact that the tenant remained in possession after "the letter written by him. I take it that it would be a "question for a jury in such a case, whether there was the "consent of both parties that the tenant should remain in "possession after the termination of the expired tenancy. If "the tenant under such circumstances remained in possession "without saying anything, I should say that a jury ought "to conclude that he consented to continue in possession as "tenant. If the tenant remained in possession, but made "some statement inconsistent with his remaining as tenant— "for instance, if he said that the property belonged to him, "or if he defied the landlord to do his worst, and said that he

---

(1) [1893] 1 Q. B. 736.
(2) (1838) 3 M. & W. 328.
(3) [1920] 2 K. B. 106.
(4) (1891) 8 T. L. R. 43.
(5) [1924] 1 Ch. 236.
(6) (1860) 29 L. J. (Ex.) 275.
(7) (1786) 1 T. R. 159.

---

(1) [1893] 1 Q. B. 736.
(2) 1 T. R. 159.
(3) [1893] 1 Q. B. 739.
(4) 1 T. R. 162.

"would not go out till he was turned out—in that case I "should think the jury would say that he did not consent "to remain in as tenant, and was a mere trespasser."

In the present case nothing that happened on December 31, 1940, altered the contractual relationship then subsisting between the parties. I cannot conclude, as the Court of Appeal could in *Dougal* v. *McCarthy* (1), that on that day a new agreement was come to between the parties altering the agreement which they had made in the previous October. In my judgment, therefore, *Dougal* v. *McCarthy* (1) does not govern this case, which depends on the true view of the correspondence which passed before December 31, 1940. I award the plaintiffs 75*l*. by way of rent, and the company must pay the costs of the action.

Solicitors for plaintiffs: *Gerrish & Foster.*
Solicitors for company: *Evill & Coleman.*

K. R. A. H.

---

(1) [1893] 1 Q. B. 736.

FARWELL J.
1942
Mar. 23

In re WARD.

Ex parte HAMMOND AND SON *v.* THE OFFICIAL RECEIVER AND THE DEBTOR.

Bankruptcy—Surplus in hands of trustee—Right of bankrupt thereto—Payment of creditors in full—" Creditors "—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 69.

By the Bankruptcy Act, 1914, s. 69: " The bankrupt shall be " entitled to any surplus remaining after payment in full of his " creditors, with interest, as by this Act provided . . . . "

All the creditors who had proved in the bankruptcy of the debtor were paid in full, and thereafter there remained in the hands of the official receiver, who had been the trustee, a sum of 227*l*. There were further creditors who had not lodged proofs and these remained unpaid. Judgment had been recovered against the debtor in respect of a debt which he had incurred since his bankruptcy: and the judgment creditor applied to the court for a charging order on the balance in the hands of the official receiver to the extent of 59*l*., the amount due under the judgment:—

Held, that " creditors " in s. 69 of the Act meant only creditors who had proved in the bankruptcy, and accordingly the balance in the hands of the official receiver was held by him in trust for the debtor and the judgment creditor was entitled to the charging order.

In re Prior [1921] 3 K. B. 333 considered.

FARWELL J.

1942

WARD, *In re.*

HAMMOND & SON *v.* THE OFFICIAL RECEIVER, *Ex parte.*

MOTION.

The facts appear in the headnote.

Baskerville, for the judgment creditor. The judgment creditor is entitled to a charging order on the balance in the hands of the official receiver. The bankrupt is entitled to that balance under s. 69 of the Bankruptcy Act, 1914, as "creditors" in that section means only creditors who have proved in the bankruptcy and all those creditors have been paid in full. He referred to *In re Prior* (1); *In re Pavyer* (2).

Aronson for the official receiver. The official receiver takes the view that he has no power to release the money as the bankrupt cannot be treated as having paid all his creditors while creditors who have not proved in the bankruptcy are still unpaid. Where "creditor," only, is used in s. 69 of the Act of 1914, it refers to all the creditors. [He referred to Williams on Bankruptcy, 15th ed., pp. 90, 142.]

Baskerville replied.

FARWELL J. The question which I have to determine is whether the court ought to make the charging order which is sought by the judgment creditor. The Court of Appeal in *In re Prior* (1) decided that where a debtor against whom a receiving order had been made paid money into court to satisfy his debts in full and the receiving order was then rescinded by an order which directed the official receiver, after paying the debts and deducting his costs, charges and expenses, to pay the balance in his hands to the debtor, there was jurisdiction in the registrar in bankruptcy to make a charging order in favour of a judgment creditor against the money in the hands of the official receiver. The Court of Appeal held that, not only had they power to make the order, but the registrar in bankruptcy also had power to do so. There is, therefore, no doubt that a registrar in bankruptcy can make a charging order where the whole of the debts of the bankrupt have been paid in full. It is said that that decision applies here, but this case differs from that before the Court of Appeal because, while the creditors who proved in this bankruptcy have been paid in full, other creditors never proved their debts which, therefore, have not been paid.

---

(1) [1921] 3 K. B. 333.

(2) (1936) 52 T. L. R. 383.

Does the surplus which remains in the hands of the official receiver, after paying in full the creditors who have proved in the bankruptcy, with interest and costs, charges and expenses, belong to the bankrupt or should it be retained by the official receiver or dealt with so as to provide for the debts of those creditors who did not prove? Sect. 65 of the Bankruptcy Act, 1914, provides: "Any creditor who has not "proved his debt before the declaration of any dividend or "dividends shall be entitled to be paid out of any money "for the time being in the hands of the trustee any dividend "or dividends he may have failed to receive before that "money is applied to the payment of any future dividend or "dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved "by reason that he has not participated therein." That section provides that a creditor who has not proved his debt before a dividend is declared and paid, may yet come in and claim to participate in any future dividend which may be payable although he cannot disturb any dividend which has already been paid. In my judgment, the words "any "creditor" there mean any creditor who has proved his debt, although he comes in late and after a dividend has been declared. The section does not apply to a person who claims to be a creditor, but has never satisfied the Bankruptcy Court that he is a creditor by proving for his debt. Sect. 67, sub-s. 1, provides: "When the trustee has realised all the "property of the bankrupt, or so much thereof as can, in the "joint opinion of himself and of the committee of inspection, "be realised without needlessly protracting the trusteeship, "he shall declare a final dividend, but before so doing he shall "give notice in manner prescribed to the persons whose claims "to be creditors have been notified to him, but not "established to his satisfaction, that if they do not establish "their claims to the satisfaction of the court within a time "limited by the notice, he will proceed to make a final dividend, "without regard to their claims." By sub-s. 2: "After the "expiration of the time so limited, or, if the court on "application by any such claimant grants him further time "for establishing his claim, then on the expiration of such "further time, the property of the bankrupt shall be divided "among the creditors who have proved their debts, without "regard to the claims of any other persons." That section provides that, when the trustee has got in all the property of the bankrupt or all such property as he can obtain, he is to declare a final dividend, but, before doing so, he must give notice to all persons whose claims to be creditors have been notified to him but not established to his satisfaction to give them an opportunity to establish their debts as debts which ought to be admitted to proof, and if they do not come in within the time limit, or cannot establish their proof within that time, the trustee is directed to declare a final dividend without regard to their claims. Finally, s. 69 is in these terms: "The bankrupt shall be entitled to any surplus "remaining after payment in full of his creditors, with interest, "as by this Act provided, and of the costs, charges, and "expenses of the proceedings under the bankruptcy petition." If that section means that the bankrupt shall be entitled to any surplus remaining after the creditors who have proved in the bankruptcy have been paid in full with interest together with costs, charges, and expenses there can be no ground for refusing the charging order asked for here. If, on the other hand, the word "creditors" means that everybody who claims to be a creditor of the bankrupt without regard to whether he has proved or not, has to be paid in full, then, there being according to the bankrupt's statement, creditors who have never proved and have, therefore, never been paid, the surplus cannot belong to the bankrupt, because the only right which the bankrupt has is to call on the trustee to pay to him the surplus which remains after his creditors have been paid in full.

Throughout the Act it will be found that the word "creditors" is used both as meaning persons who have claims against the bankrupt and persons who have proved in the bankruptcy. It is not easy to ascertain which meaning should be attributed to the word in s. 69. On the whole I have come to the conclusion that "creditors" in this section must be read as meaning creditors who have proved in the bankruptcy so as not to include those persons who have not proved and have not established any claim to the satisfaction of the court, and, therefore, under s. 67 are prevented from receiving any part of the final dividend which may be declared. In my judgment, this portion of the Act contemplates that there shall be finality, and, if notice is given to the persons who the bankrupt says are his creditors, those who do not

FARWELL J.
1942
WARD, *In re*.
HAMMOND & SON *v.* THE OFFICIAL RECEIVER, *Ex parte*.

choose to come in and prove their debts in the bankruptcy are not treated as creditors within the meaning of the section. Consequently, on all the creditors who have proved in the bankruptcy being paid in full with interest and costs, the balance in the hands of the trustee is held by him in trust for the bankrupt and, consequently, is a fund in respect of which a charging order can properly be made. I will, therefore, make the order.

Solicitors: *Haslewood, Hare & Co., for Bosley, Legg & Co., Brighton; Solicitor to the Board of Trade.*

J. L. D.

FARWELL J.
1942
Mar. 20, 24.

In re HOFF.

CARNLEY *v.* HOFF.

Power of appointment—Legitimacy—"Child or children"—"Disposition "coming into operation before commencement of Act"—Will of 1860 *—Death of testator in* 1861*—Appointment in* 1934 *in favour of legitimated child—Validity—Legitimacy Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 10, *sub-s.* 2.

By a will made in 1860, and proved in 1861, a freehold estate was devised by the testator to such uses for the benefit of any child or children of W. H. as W. H. should by deed or will appoint, and subject thereto to the use of such children of W. H. as should attain the age of twenty-one or marry, if more than one in equal shares as tenants in common. W. H. had four illegitimate children. In 1934, when two of the children were living, and had attained the age of twenty-one, W. H. married their mother, thereby legitimating them, and immediately afterwards, by a deed purporting to be in exercise of the power of appointment created by the will, he appointed that, subject to his own life interest, the premises devised by the will should be held in trust for his son H. E. H. absolutely. On a summons to determine whether or not the appointment was valid:—

Held, that the "disposition" within the meaning of s. 10, sub-s. 2, of the Legitimacy Act, 1926, under which H. E. H. claimed was the will of 1860, and not the appointment of 1934, and as, by the law obtaining at the date of the will only children born in wedlock were entitled, H. E. H. was not a proper object of the power and the appointment to him was invalid and ineffective.

ADJOURNED SUMMONS.

The testator, William Hoff, the elder, by his will dated

November 6, 1860, devised all his freehold messuages and tenements, farm land, hereditaments, and premises in Grebby, Lincolnshire, unto and to the use of his son, William Gilson Hoff, for life, and from and after his decease (so far as is material) to the use of his grandson, William Hoff, the younger, during his life and subject thereto to such uses and upon such trusts and in such manner for the benefit of any child or children of his grandson, William Hoff, the younger, as he should by deed or will appoint, and subject thereto to the use of such child or children of William Hoff, the younger, as should attain the age of twenty-one years or marry, if more than one in equal shares, and his, her and their heirs and assigns for ever as tenants in common. And in case there should be no child of his said grandson, William Hoff, then to and upon the like uses and trusts in favour and for the benefit of his grandson, Henry Hoff, and his issue as were thereinbefore limited of the hereditaments settled on William Henry Haxly and his issue. The testator died on March 18, 1861, and his will was proved by his executor, William Gilson Hoff. The property at Grebby so settled consisted of a residence, Grebby Hall, with farmhouse, cottages and about 355 acres of land. By his will, dated November 16, 1897, William Gilson Hoff appointed his wife, Martha Hoff, and his two sons, William Hoff, the younger, and Henry Hoff, executors. He died on January 7, 1898, and his will was duly proved. His wife died on April 28, 1922. On the death of William Gilson Hoff, William Hoff, the younger, became tenant for life of the Grebby property. He was unmarried, but had four children by his housekeeper. The four children included a son who was the first defendant, Henry Egglestone Hoff, another son, and a daughter. On May 11, 1934, William Hoff and his former housekeeper were married. By a deed of appointment dated May 11, 1934, and executed immediately after the marriage ceremony, William Hoff, the younger, after reciting (inter alia) that he had only one son then living, namely, Henry Egglestone Hoff, who had then attained the age of twenty-one years, in exercise of the power for that purpose given to him by the will of William Hoff, the elder, and of every and any other power thereto enabling him, appointed that from and after his death and in the meantime subject to his life interest therein the premises devised by the said will and comprised in the schedule thereto (being the Grebby property) and the income thereof should be held in trust for

FARWELL J.
1942
HOFF, *In re*.
CARNLEY *v.* HOFF.

the defendant, Henry Egglestone Hoff, absolutely. Following the marriage of William Hoff the births of the first defendant and the daughter were re-registered. By his will dated May 11, 1934, William Hoff, the younger, appointed the two plaintiffs executors and trustees. He died on January 21, 1941, at the age of ninety, and his will was duly proved. Henry Hoff, another grandson of the original testator, by his will dated April 27, 1937, appointed his son, Henry Gilson Hoff, his daughter, Alice Isabel Mary Gilson Pattrick, and Horace Cambridge Peacock, executors and trustees, and in exercise of the power for this purpose conferred on him by the will of William Hoff, the elder, directed and appointed that the trustees of the will should stand possessed of the Grebby property (which he had power to appoint to his child or children on the failure of issue of his brother William Hoff) in trust for his son, the defendant, Henry Gilson Hoff, absolutely. Henry Hoff died on September 12, 1940, leaving two children, one of whom was the second defendant.

The executors of the will of William Hoff, the younger, took out this summons asking whether they ought, subject to their powers and rights as representatives, to execute an assent vesting the Grebby Hall estate, and in whose favour, i.e., whether in the events which had happened and on the true construction of the Legitimacy Act, 1926, the appointment made by the deed of 1934 in favour of the first defendant, Henry Egglestone Hoff, was valid and effective, or whether it failed, in which event the appointment made by the will of Henry Hoff in favour of his son, Henry Gilson Hoff, the second defendant, would take effect.

J. A. Reid, for the executors.

Rose, for the defendant, Henry Egglestone Hoff. The appointment made by the deed of 1934 was valid and effective in favour of Henry Egglestone Hoff. The disposition under which he takes is not the original will of William Hoff, the elder, but the instrument exercising the power: *In re de la Bere's Settlement Trusts* (1). No estate existed in him until the exercise of that power, and at its date he was a legitimate child of William Hoff, the younger, and a proper object of the power. The objects of the power are "any child or children of "William Hoff, the younger." There is no reference to the children of any marriage, so *In re Wick's Marriage Settlement* (2)

---

(1) [1941] Ch. 443.

(2) [1940] Ch. 475.

FARWELL J.

1942

HOFF, *In re.*

CARNLEY
v.
HOFF.

does not apply. A child is legitimate whether he is born in wedlock, or out of wedlock and subsequently legitimated by the Act and the marriage of his parents: *In re Grey's Trusts* (1). A devise of real estate to children includes subsequently legitimated children: *In re Andros* (2): The first defendant takes under a disposition coming into operation after the commencement of the Legitimacy Act, 1926, s. 10, sub-s. 1, of which does not, therefore, apply here (3).

Wilfrid Hunt for the defendant, Henry Gilson Hoff. It is submitted that s. 10, sub-s. 2, of the Legitimacy Act, 1926, destroys any possible claim by the first defendant. That sub-section provides that nothing in the Act is to affect the construction of any will or other instrument coming into operation before the commencement of the Act and, therefore, the appointment of 1934 must be read into the will creating the power. The will and not the appointment is the real disposition under which the first defendant is claiming, and "children" in that will means only legitimate children born in wedlock and cannot include subsequently legitimated children. The argument on behalf of the first defendant necessarily assumes that the class which takes in default of appointment is not the same class as that which may take under the appointment. Sect. 3, sub-s. 1, which must be read subject to s. 10, sub-s. 2, does not apply here. In *In*

---

(1) [1892] 3 Ch. 88.

(2) (1883) 24 Ch. D. 637.

(3) By Legitimacy Act, 1926, s. 1, sub-s. 1: "Subject to the "provisions of this section, where "the parents of an illegitimate "person marry, or have married "one another, whether before or "after the commencement of this "Act, the marriage shall, if the "father of the illegitimate person "was or is at the date of the "marriage domiciled in England "or Wales, render that person, if "living, legitimate from the com"mencement of this Act, or from "the date of the marriage, which"ever last happens."

Sect. 3, sub-s. 1: "Subject to "the provisions of this Act, a "legitimated person and his "spouse, children or more remote "issue shall be entitled to take "any interest. . . . (*b*) under "any disposition coming into "operation after the date of "legitimation . . . . in like "manner as if the legitimated "person had been born legiti"mate."

Sect. 10, sub-s. 2: "Nothing "in this Act shall affect the "operation or construction of any "disposition coming into opera"tion before the commencement "of this Act. . . ."

Sect. 11: For the purposes of "of this Act . . . . the expression "'disposition' means an assurance "of any interest in property by "any instrument whether inter "vivos or by will."

FARWELL J. 1942 HOFF, *In re.* CARNLEY *v.* HOFF.

re Wick's Marriage Settlement (1), s. 10, sub-s. 2, of the Act of 1926 was not cited to the court. Wolstenholmes and Cherry's Conveyancing Statutes, vol. ii., note to s. 3, sub-s. 1, of the Act, p. 1558, was referred to.

Cur. adv. vult.

Mar. 24. FARWELL J. The question which has arisen for decision is whether the appointment made in 1934 by William Hoff, the younger, after his marriage, in favour of the first defendant is valid. If not, it seems to follow that the appointment made by the will of Henry Hoff in favour of the second defendant is effective.

But for the Legitimacy Act, 1926, the case would present no difficulty, for it is plain that the words "child or children" used in the will of 1860, meant, at the time when that will came into operation, and could only mean legitimate children, and at that time the only persons in whose favour the power could be exercised and the only persons who would become entitled in default of the exercise of the power were any children born in wedlock that William Hoff, the younger, might have. Those of his children, however, who were alive in 1934 were rendered legitimate from the date of the marriage of their parents in that year by virtue of s. 1, sub-s. 1, of the Act of 1926, and it is said that the effect of the Act is to make those children objects of the power of appointment given by the will, although before their legitimation they were not children within the meaning of the will. It is therefore necessary to look at the terms of the Act so far as they bear upon the question.

[His Lordship read the provisions of ss. 3, 10 and 11 of the Act, and continued :]

Sect. 11 of the Act, the interpretation section, provides: "The expression 'disposition' means an assurance of any "interest in property by any instrument whether inter vivos "or by will." Is the will of the testator made in 1861 the disposition or, as is said on behalf of the first defendant, is the appointment which was made by deed in 1934, after the marriage ceremony, the disposition? If the will is the disposition, then it must follow that the children who were legitimated by the marriage of William Hoff, the younger, in 1934, although they became legitimated by the Act, never in fact became objects of the power of appointment or persons who would be entitled in default of appointment under the will because on the true construction of the will "children" must necessarily be confined to legitimate children, that is, children born in wedlock, for to put any other meaning on the word "children" would be to do that which the Act expressly forbids, namely, allow the Act to affect the operation or construction of a disposition coming into operation before the commencement of the Act. On the other hand, if the appointment, which was only made in 1934, in favour of the first defendant is the disposition, then, under the Act, the first defendant was an object of the power and the property appointed to him.

---

(1) [1940] Ch. 475.

In my judgment, the answer to the question is that the word "disposition" as used in the Act means the will of the testator and not the appointment. It is true, as was pointed out, that the effect of a valid appointment under a special power is to create a new estate and to divest the estate which up to then was vested in the persons entitled in default of appointment, but the property in question here was disposed of by the will of the testator. It was his property and by his will he left it in terms which disposed of it although he left to another person the power to select out of the persons entitled in default of appointment the person who should have the benefit of the property. If the will itself is not the disposition the result would seem to be an odd one, because it would come to this, that the power of appointment was exercised in favour of a person who was not a person entitled in default of appointment except by reason of this Act; and to construe in that way the word "disposition" could only result in the Act having the effect of altering the construction of the will itself, which is the disposition.

In my judgment the answer to this question is that the word "disposition" as used in this section means the will of the testator, that is the will of William Hoff made in 1860, which came into effect upon his death in 1861, and on the true construction of the will the children of the connection between William Hoff and his housekeeper were not objects of the power of appointment, nor were they persons who could take in default of appointment. The result is that the appointment in favour of the first defendant which was professedly made by the deed of 1934, was not a valid appointment because it was an appointment to a person who was not an object of the power; and that the appointment made in favour of the second defendant is valid and takes effect accordingly. I will make a declaration to that effect.

Solicitors: *Cameron, Kemm & Co., for S. B. Carnley & Tinn, Alford, Lincs; Crossman, Block & Co., for Reed, Wayman & Hyner, Downham Market.*

H. L. L.

C. A.
1942
Mar. 26, 27.

In re SMITH AND FAWCETT, LIMITED.

Company—Private company—Transfer of shares—Registration—Refusal —Powers of directors—Motives for refusal—Affidavit evidence.

Article 10 of the articles of association of a private company provided: "The directors may at any time in their absolute and "uncontrolled discretion refuse to register any transfer of shares, "and cl. 19 of Table A shall be modified accordingly." The issued capital of the company consisted of 8002 ordinary shares, of which the two directors of the company, J. F. and N. S., held 4001 each. J. F. died, and his son as his executor applied to have the testator's shares registered in his name. N. S. refused to consent to the registration, but offered to register 2001 shares and to buy 2000 at a fixed price. The executor applied to the court by way of motion that the register of members of the company might be rectified by inserting his name as the holder of the 4001 shares:—

Held, affirming Simonds J., that art. 10 gave the directors the widest powers to refuse to register a transfer, and that, while such powers are of a fiduciary nature and must be exercised in the interests of the company, there was nothing to show that they had been otherwise exercised.

Affidavit evidence is unsatisfactory evidence of the motives of directors in exercising their powers.

APPEAL from Simonds J.

On December 15, 1937, Smith & Fawcett, Ld., was incorporated as a private company to take over a business carried on by Joseph Fawcett and Norman Smith. The nominal capital of the company was 25,000*l*., divided into 10,000 preference and 15,000 ordinary shares of 1*l*. each, but only 8002 ordinary shares were issued, 4001 to Fawcett and 4001 to the first defendant, Smith, who were the directors of the company. Art. 10 of the articles of association provided: "The directors may at any time in their absolute "and uncontrolled discretion refuse to register any transfer "of shares, and cl. 19 of Table A shall be modified "accordingly." Fawcett by his will, dated August 2, 1939, appointed his wife and his son, Edwin Arthur Fawcett, the plaintiff, to be the executors and trustees thereof, and, after making certain provisions applicable during the widowhood of his wife, he bequeathed, on her death, 2000 shares in the company to his daughter, Alice Marjorie Fawcett, and 2001 shares to the plaintiff. Joseph Fawcett died on February 26, 1940. In April, 1940, Mrs. Fawcett and the plaintiff, as executors of Joseph Fawcett, applied to Smith that they should be registered as members of the company, and that the plaintiff should be appointed to be a director of the company. Smith, however, refused to consent to the registration or appointment, but offered to register 2001 shares and to buy 2000 of the shares at a price fixed by himself. In July, 1940, Smith appointed the second defendant, his solicitor, J. W. Feather, to be a director of the company. Mrs. Fawcett died on April 11, 1941. Some time afterwards the plaintiff again asked Smith to register him as a member of the company, but Smith, with the assent of Feather, refused. The plaintiff then applied to the court by way of motion that the register of members of the company might be rectified by inserting his name as the holder of the 4001 shares. Simonds J. dismissed the motion. The plaintiff appealed.

Spens K.C. and *Pennycuick* for the plaintiff. Smith's refusal to register the transfer was on a wrong principle since it was not made for the benefit of the company, but was rather to preserve the dominating position of Smith. The ground of refusal must be personal to the transferee: *In re Bede Steam Shipping Co., Ld.* (1), and the fact that the transferee might not be a fit and proper person to be a director is irrelevant, as is also the fact that the transfer may result in a deadlock. The proprietary rights of shareholders give them a right to transfer. There is no case in which the court has upheld a refusal to register in respect of part of a holding while the remainder is registered. They also cited *In re Royal British Bank: Nichol's case* (2), *In re Gresham Life Assurance Society: Ex parte Penney* (3), *In re Stranton Iron and Steel Co.* (4) and *In re Dublin North City Milling Co.* (5).

---

(1) [1917] 1 Ch. 123.
(2) (1858) 3 De G. & J. 387.
(3) (1872) L. R. 8 Ch. 446.
(4) (1873) L. R. 16 Eq. 559.
(5) (1909) 1 I. R. 179.

Roxburgh K.C. and *Sir Norman Touche* for the defendants were not called on.

LORD GREENE M.R. The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider—not what a court may consider—is in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles on their true construction permit them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than that the shareholder has such a prima facie right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit. Another consideration which must be borne in mind is that this type of article is one which is for the most part confined to private companies. Private companies are in law separate entities just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations. Accordingly, it is to be expected that in the articles of such a company the control of the directors over the membership may be very strict indeed. There are, or may be, very good business reasons why those who bring such companies into existence should give them a constitution which confers on the directors powers of the widest description.

The language of the article in the present case does not point out any particular matter as being the only matter to which the directors are to pay attention in deciding whether or not they will allow the transfer to be registered. The article does not, for instance, say, as is to be found in some articles, that they may refuse to register any transfer of shares to a person not already a member of the company or to a transferee of whom they do not approve. Where articles are framed with some such limitation on the discretionary power of refusal as I have mentioned in those two examples, it follows on plain principle that if the directors go outside the matters which the articles say are to be the matters and the only matters to which they are to have regard, the directors will have exceeded their powers.

Mr. Spens, in his argument for the plaintiff, maintained that whatever language was used in the articles, the power of the directors to refuse to register a transfer must always be limited to matters personal to the transferee and that there can be no personal objection to the plaintiff becoming a member of the company because the directors are prepared to accept him as the holder of 2000 of the shares which have come to him as legal personal representative of his father. Mr. Spens relies for his proposition on observations in several authorities, but on examination of those cases it becomes clear that the form of article then before the court by its express language confined the directors to the consideration of the desirability of admitting the proposed transferee to membership on grounds personal to him. I cannot put the point which I am endeavouring to make with greater clearness than in the words used by Warrington L.J. in *In re Bede Steam Shipping Co., Ld.* (1). There the articles empowered the directors "in their discretion and without assigning any "reason therefor" to "refuse to register the transfer of any "share (not being a fully paid-up share) to any person of whom "they do not approve as transferee, and may decline to "register the transfer of any fully paid-up share or shares "on certifying that in their opinion it is contrary to the "interests of the company that the proposed transferee "should be a member thereof." Warrington L.J. said (1): "The article gives them one ground, and one ground only, "for refusing to register the transfer of a fully-paid share, "namely, that in their opinion it is contrary to the interests "of the company that the proposed transferee should be a "member." It is perfectly clear from that observation that the court was not laying down a general rule to be applied to all forms of article, but was coming to a decision on the particular article before it, the nature of which was such as to confine the directors to the consideration of one particular matter.

---

(1) [1917] 1 Ch. 123, 136.

C. A.
1942
SMITH AND FAWCETT, LD., *In re.*
Lord Greene M.R.

There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the interests of the company, and thereby to admit or not to admit a particular person and to allow or not to allow a particular transfer for reasons not personal to the transferee but bearing on the general interests of the company as a whole—such matters, for instance, as whether by their passing a particular transfer the transferee would obtain too great a weight in the councils of the company or might even perhaps obtain control. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion.

That being my view on the question of law in this case, it only remains to consider the issue of fact which has been raised. It is said that on the evidence before us we ought to infer that the directors here were purporting to exercise their power to refuse a transfer not bona fide in the interests of the company but for some collateral purpose, namely, the desire of the leading director to acquire part of the shares for himself at an under-value. Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not means that it is illegitimate in a proper case to draw inferences as to bona fides or mala fides in cases where there is on the face of the affidavit sufficient justification for doing so, but where the oath of the deponent is before the court, as it is here, and the only grounds on which the court is asked to disbelieve it are matters of inference, many of them of a

C. A.
1942
SMITH AND FAWCETT, LD., *In re.*
Lord Greene M.R.

doubtful character, I decline to give to those suggestions the weight which is desired. In the present case the principal director has sworn an affidavit which, if accepted, makes it clear that, whether rightly or wrongly, the directors have bona fide considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares. Accordingly, on the evidence I am satisfied, as the learned judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been due to anything but a bona fide consideration of the interests of the company as the directors see them. That being so, and that being, on the true construction of the article, the only matter to which the directors have to pay regard, I am of opinion that the learned judge was right in the conclusion to which he came and that this appeal fails.

LUXMOORE L.J. I agree.

ASQUITH J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Ward, Bowie & Co., for A. V. Hammond & Co., Bradford.*

Solicitors for defendants: *Wynne-Baxter & Keeble, for James A. Lee & Priestley, Bradford.*

P. J. B.

In re WARING.

WESTMINSTER BANK, LIMITED *v.* AWDRY.

FARWELL J.
1942
Apr. 15.

Will—Annuities—"Free of income tax"—Rate of tax—Will dated before September 3, 1939*—Death of testator after that date—Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25.

Section 25 of the Finance Act, 1941, under which directions are given with regard to provisions contained in documents for the payment of stated amounts free of income tax, does not operate on the will of a testator, who died after September 3, 1939, although his will was made before that date.

ADJOURNED SUMMONS.

By his will, dated February 11, 1939, the testator, John

FARWELL J.
1942
WARING, *In re.*
WESTMINSTER BANK, LD. *v.* AWDRY.

Arkle Waring, bequeathed two annuities of 100*l.* each "free of "income tax." By a codicil, dated March 8, 1939, he directed as follows: "I empower my trustees to set apart as soon as "conveniently may be and invest in their names . . . . a sum "the income whereof when invested shall be sufficient at the "time of investment to pay the annuities bequeathed by "my said will . . . ." The testator died on August 3, 1940. The executors of the will took out a summons to determine whether, in appropriating a fund to satisfy the annuities, the provisions of s. 25 of the Finance Act, 1941 (1), applied to a will made before September 3, 1939, by a testator who died after that date.

J. A. Wolfe for the executors.

Mrs. Cozens-Hardy Horne for one of the annuitants. The provisions of s. 25 have no application as, although the testator made his will before September 3, 1939, it did not take effect until his death after that date and, accordingly, no "provision" to which the section can apply was made until the testator died.

J. V. Nesbitt for the residuary legatee. The section applies to this will, as the "provision" was contained in a document executed before September 3, 1939.

Humphrey King, *W. F. Waite*, *D. L. Oliver* and *Sir Norman Touche*, for parties interested.

FARWELL J. The question for my determination is whether or not s. 25 of the Finance Act, 1941, applies to a will made before September 3, 1939, by a testator who died after that date. It is not until the death of a testator that provisions contained in the will take effect, and, therefore, in my judgment, the provision with which I am concerned here was not "made" until after September 3, 1939. Until the death of the testator the will was a document bearing date before September 3,

---

(1) By Finance Act, 1941, s. 25: "(1.) . . . . any provision, however worded, for the payment, "whether periodically or otherwise, of a stated amount free of "income tax . . . . being a provision which—(*a*) is contained " . . . . in any will or codicil, " . . . . and (*b*) was made before "September 3, 1939, and (*c*) has "not been varied on or after that "date, shall, as respects payments "falling to be made during any "year of assessment, the standard "rate of income tax for which is "ten shillings in the pound, have "effect as if for the stated amount "there were substituted an "amount equal to twenty twenty-"ninths thereof . . . . "

1939, but it had no effect. Sect. 25 of the Finance Act, 1941, therefore does not apply.

FARWELL J.

1942

WARING, *In re*.
WESTMINSTER BANK, LD. *v.* AWDRY.

Solicitors: *Ouvry & Co.; Lee & Pembertons; Preston, Lane-Claypon & O'Kelly; Corbould, Rigby & Co.*

J. L. D.

In re SHARMAN'S WILL TRUSTS.

PUBLIC TRUSTEE *v.* SHARMAN.

BENNETT J.

1942
Apr. 15, 16, 17.

Trust—Trustee—Disclaimer of office—Estoppel—Indorsement on counsel's brief—Order of court.

A testator, who died in 1928, appointed S. and P. executors and trustees of his will and bequeathed a legacy of 1000*l*. to P. if he should prove the will and accept the trusteeship thereof. Both executors proved the will in 1929 and the legacy was paid. In 1933, disputes having arisen between the executors and the beneficiaries, a summons was taken out and inquiries ordered on questions as to debts due by P. to the estate, or by the estate to P. Ultimately a compromise was entered into between all parties and the briefs of counsel engaged were indorsed with the statement that P. had agreed to disclaim or retire from the trusteeship, on two new trustees or the Public Trustee being appointed: but no new trustees were then appointed. In 1938 another summons in the matter of the estate was taken out asking that fit persons might be appointed in place of S., who had died, and of P. "who "has disclaimed or is desirous of retiring from the trusteeship," and on February 23, 1939, an order was made reciting that P. had disclaimed the trusteeship and appointing the Public Trustee judicial trustee of the will. On the present summons the beneficiaries contended that P., having disclaimed the trusteeship and never having acted as trustee, was not entitled to retain the legacy of 1000*l*. P. denied that he had disclaimed the trusts of the will:—

Held, on the facts (*a*) that P. had never disclaimed the office of trustee of the will, but had accepted it and performed various acts as such trustee, (*b*) that he was not estopped by the indorsements on counsel's briefs or by the order of February 23, 1939, from denying that he had disclaimed the trusts, the question having only been collateral to the previous proceedings and not then in issue between the parties.

Duchess of Kingston's Case (1776) 2 Sm. L. C., 13th ed., 644; *Reg. v. Hutchings* (1881) 6 Q. B. D. 300; and *In re Lister* [1926] Ch. 149 applied.

BENNETT J.

1942

SHARMAN'S WILL TRUSTS, *In re.*

PUBLIC TRUSTEE *v.* SHARMAN.

ADJOURNED SUMMONS.

By his will, dated November 6, 1928, John Earl Sharman, who died on November 26, 1928, appointed: " my brother "Charles James Sharman and my friend Thomas Paton, "chartered accountant (hereinafter called "my trustees"), to "be the executors and trustees of this my will, and I give to "the said Thomas Paton, if he shall prove my will and accept "the trusteeship thereof, a legacy of 1000*l.* free of duty." Probate was granted to the executors on March 25, 1929, and the legacy of 1000*l.* was paid to Thomas Paton at the suggestion of his co-executor. In July, 1931, a summons was issued for the decision of certain questions relating to the administration of the estate and it came before Bennett J. An inquiry was ordered which came before Clauson J. in 1933, when the parties came to terms. The briefs of all the counsel engaged on the summons, including counsel for Thomas Paton, were indorsed as follows: " The plaintiff and the defendant "Paton by their counsel having stated that they did not wish "to become or act as trustee of the will of the testator agreed "to disclaim or retire from the trusteeship of the will if the "defendant Mrs. Ada Sharman should appoint either two "individual trustees or the Public Trustee or a trust company "to be trustees of the will in their place, it being understood "that the plaintiff and the defendant Paton are to complete "their duties as executors." On April 11, 1938, another summons was issued in the matter of the testator's estate, and, as amended, it asked (*a*) that pursuant to s. 41 of the Trustee Act, 1925, fit persons might be appointed in place of Charles James Sharman, deceased, and Thomas Paton, " who "has disclaimed or alternatively is desirous of retiring from "the trusteeship thereof," and (*b*) that the Public Trustee might be appointed judicial trustee of the will. On February 23, 1939, an order was made to that effect, reciting that Charles James Sharman was dead and that the defendant Thomas Paton " disclaimed the trusteeship thereof." The question raised by the present summons was whether Thomas Paton had qualified for the legacy of 1000*l.* which he had received by accepting the trusteeship or the office of trustee of the testator's will, or whether he had disclaimed the trusts. Thomas Paton in two affidavits denied an allegation that he had never acted as trustee of the will, and said that he and his co-trustee paid the income of tenants for life of parts of the estate. All parties, he said, knew that the legacy of 1000*l.*

had been paid to him in 1929, and no question was raised as to the propriety of such payment until the issue of the present summons. The compromise which had been entered into was intended to settle all questions between him and the estate. The defendant swore that he never knew that the disclaimer or any statement as to the disclaimer had been embodied in the order made on February 23, 1939.

J. V. Nesbitt for the Public Trustee.

Hewins for the testator's widow.

Wilfrid Hunt for tenants for life of deferred settled legacies. The defendant Paton could only qualify for the legacy of 1000*l.* by proving the will and accepting the trusts. He proved the will, but whatever else he did in the administration of the estate is referable to his office as executor, not as trustee. He did not accept but he disclaimed the office of trustee. A statement that he had disclaimed the office was indorsed on all counsel's briefs on the summons heard in 1933 and was recited in the order made on February 23, 1939. The defendant is therefore estopped by record from denying that he disclaimed the office.

D. Cohen for tenants for life of settled legacies argued to the same effect.

Pascoe Hayward for Thomas Paton. Thomas Paton accepted the office of trustee before 1933 and he never disclaimed. Probate of the will is the acceptance of the office of trustee: *Mucklow* v. *Fuller* (1); *Ward* v. *Butler* (2). Any indorsement by counsel on a brief or recital in an order that he had disclaimed the office was made without his knowledge or approval. The language of the indorsement was "disclaim or retire." What he intended to do and did at that time was to retire from an office which he had accepted, and in which he did many acts only referable to such office.

[Underhill on the Law of Trusts, 9th ed., art. 35, p. 202, and Lewin on Trusts, 14th ed., pp. 175–178, were referred to.] The statement in the order of 1939 that he had disclaimed the office does not operate by way of estoppel by record to prevent him from contending that he had accepted the office and acted as trustee. There was no litigation or dispute on the question whether he had disclaimed or retired, and the recital in the order, which was erroneous, was only inserted to show that he was no longer a trustee. The question whether he had disclaimed or retired was only collateral to the matters in

---

(1) (1821) Jac. 198.

(2) (1824) 2 Mol. 533.

BENNETT J.
1942
SHARMAN'S WILL TRUSTS, *In re.*
PUBLIC TRUSTEE *v.* SHARMAN.

issue or "incidentally cognizable." *Duchess of Kingston's Case* (1); *Reg.* v. *Hutchings* (2); *Barrs* v. *Jackson* (3).

Waite, Goff, Lightman, Watmough, Heckscher and Rose for other defendants supported *Hunt's* argument.

BENNETT J. Mr. Hunt put his case that Mr. Paton is not entitled to the legacy on the ground that he had disclaimed the office of a trustee. His argument was that a person who has disclaimed that office can never, as a matter of law, be said to have accepted it, and that, having regard to the fact that the disclaimer was recited in the order of 1938, Mr. Paton is now estopped as a matter of record from asserting that he accepted the office of trustee.

For his first proposition Mr. Hunt relied on art. 34 in the late Sir Arthur Underhill's "Law of Trusts and Trustees," 9th ed., in which the learned author stated the law in this way: "No "one is bound to accept the office of trustee; both the office "and the estate may be disclaimed before acceptance, but not "after." The authority cited is *Noble* v. *Meymott* (4), which, when it is looked at, is not an authority for the proposition, but it must, I think, now be taken as settled that while the office of a trustee may be disclaimed before acceptance, once it has been accepted, it cannot be disclaimed. Authority is, I think, to be found in a passage in the judgment of Sargant L.J. in *In re Lister* (5), where a disclaimer of leasehold property by a trustee in bankruptcy under the provisions of the Bankruptcy Act, 1914, was being dealt with. In connection with the word "disclaimer" the learned lord justice cites a passage from Coke upon Littleton (Co. Lit. 102*a*) as follows: "'Disclaime, disclamare . . . . signifieth utterly "'to renounce . . . .' and the word"—that is to say, the word "disclaimer"—"is habitually used in this sense at "the present day with reference to the non-acceptance "or renunciation of the office and estate of a trustee under "a deed or of an executor and trustee under a will." In my view, Mr. Hunt's argument that the office of trustee can only be disclaimed where it has not been accepted is sound.

With regard to his second proposition, the principles of the law of estoppel by judgment inter partes, originally, I

(1) (1776) 2 Sm. L. C., 13th ed., 644.
(2) (1881) 6 Q. B. D. 300.
(3) (1842) 1 Y. & C. C. C. 585, 595.
(4) (1851) 14 Beav. 471.
(5) [1926] Ch. 149, 166.

think, stated by De Grey C.J., in the *Duchess of Kingston's Case* (1), will be found summarized in a judgment of Lord Selborne in *Reg.* v. *Hutchings* (2). I will read the whole of the passage to which I was referred by Mr. Hayward on behalf of Mr. Paton. " The principles of the law of estoppel by "a judgment, inter partes, to which alone I think it is necessary "to refer, may be taken from De Grey C.J.'s opinion in the "*Duchess of Kingston's Case* (1), and from that of Knight "Bruce V.-C. in *Barrs* v. *Jackson* (3). The decision in the latter "case was reversed, but on a ground not at all touching the "statement of principles contained in it. 'The judgment' "(said De Grey C.J.) 'of a court of concurrent' (or of "exclusive) 'jurisdiction, directly upon the point, is conclusive "'upon the same matter between the same parties coming "'incidentally in question in another court for a different "'purpose. But neither the judgment of a concurrent or "'exclusive jurisdiction is evidence' (that is, as I understand "the meaning of the chief justice, conclusive evidence) 'of "'any matter which came collaterally in question, though "'within their jurisdiction; nor of any matter incidentally "'cognizable, nor of any matter to be inferred by argument "'from the judgment.'" Knight Bruce V.-C. said (3): " It "is, I think, to be collected that the rule against re-agitating "matter adjudicated is subject generally to this restriction— "that however essential the establishment of particular facts "may be to the soundness of judicial decision, however it may "proceed on them as established, and however binding and "conclusive the decision may be as to its immediate and "direct object, those facts are not all necessarily established "conclusively between the parties, and that either may again "litigate them for any other purpose as to which they may "come in question; provided the immediate subject of the "decision be not attempted to be withdrawn from its operation, "so as to defeat its direct object." To these authorities may be added the principle, on which the limitation of estoppel per rem judicatam to parties and privies depends, that res inter alios acta alteri nocere non potest.

The question on this argument is whether the court on February 23, 1939, was called on to adjudicate upon a dispute as to whether or not Mr. Paton had accepted the office of trustee. It is plain, when the summons and the order are

(1) 2 Sm. L. C., 13th ed., 644.

(2) 6 Q. B. D. 300, 304.

(3) 1 Y. & C. C. C. 585, 597.

considered, that no such dispute was adjudicated on between the parties. If that had been the subject of the litigation and there had been a recital in the order, Mr. Paton plainly would be estopped, for the matter would have been adjudicated on and decided and the principles of the law of estoppel, which I have read from Lord Selborne's judgment, would have prevented him thereafter from asserting, contrary to the adjudication of the court, that he had accepted the office of trustee. The question, whether he had done so only arose incidentally and, in my judgment, the order of February 23, 1939, is not a judgment by which Mr. Paton is now estopped from asserting that he accepted the office of a trustee. It has, of course, to be taken into account as a piece of evidence with all other relevant facts proved in order to decide the crucial matter whether or not Mr. Paton accepted the office, but that is all. It does not operate as an estoppel.

Mr. Cohen put the case against Mr. Paton on the facts. He submitted that on the facts the court ought to come to the conclusion, in the face of Mr. Paton's oath to the contrary, that he had not accepted the office of trustee. At one time he was inclined to put forward the proposition that it could not be held that Mr. Paton had accepted the office unless he had done some act which was referable exclusively to the duties of a trustee and that none of the acts which Mr. Paton admittedly had done could be said to be an act which he could only have done as a trustee, but I think that afterwards he found that position, in view of some of the authorities, a little difficult to maintain and that he finally fell in line with the view advanced by Mr. Waite that it must be proved that Mr. Paton had done some act by which he could be held irrevocably to have accepted the office of a trustee. One has to consider all that the person whose conduct is in question is proved to have done—among other things, the fact that he has proved the will, the terms of the will, the acts he has done in discharge of his duties, whether they be duties as executor or whether they be duties as trustee. If there be acts which could only be done by him as trustee there is an end of the matter. He must be said to have accepted the office. Probate of the will alone may be sufficient and that appears from a statement in a number of text books. For instance, in Lewin on Trusts, 14th ed., at p. 178, under the section which deals with the acceptance of trusts, it is said: " A trustee may accept the "office either by signing the trust deed, or by express declaration "of his assent, or by proceeding to act in the execution of the "duties of the trust. Although there is a prima facie pre"sumption in favour of the acceptance of the trust, in the "absence of special circumstances it will not be presumed that "the trustee has accepted the trust merely because he has done "nothing over a long period but has never formally disclaimed." In Underhill on Trusts and Trustees, 9th ed., at art. 35, the learned author says: "A person may accept the office of "trustee expressly, or he may do so constructively by doing "such acts as are only referable to the character of trustee "or executor, or he may do so by long acquiescence. In the "absence of evidence to the contrary acceptance will be "presumed." In the notes to the article the learned author says: "Where the office of executor is clothed with certain trusts, "or where the executor is also nominated the trustee of real "estate under a will, he is construed to have accepted the office "of trustee if he takes out probate to the will." In the present case, apart from the oath of Mr. Paton, there is evidence of a number of acts which, I think, irresistibly lead to the conclusion that he accepted the office. He proved the will. The will is one in which he is clothed with certain duties as trustee in regard to the legacies to the testator's widow which are vested in the executors on trust and the legacies to the testator's daughters. He has paid all the funeral and testamentary expenses. He has made payments to the daughters on account of the interest on their legacies, and in making those payments, whilst it is true that it has been said by his solicitors that they were made as executor, it has by them also been asserted that when they were made they were made by him as trustee. He has dealt with the testator's estate by forming a limited company to take over, in accordance with the provisions of the will, a business in which he was interested as a partner and in addition to other matters he has accepted payment to himself of a legacy to which he was entitled only upon the footing that he proved the will and accepted the office of a trustee.

Taking all those facts into consideration, the conclusion at which I have arrived is that Mr. Paton has accepted the office of trustee. Having proved the will, therefore, he has qualified himself to be paid the legacy of 1000*l.* given him by the will, and I answer the question asked in the summons in that way.

BENNETT J.
1942
SHARMAN'S WILL TRUSTS, *In re.*
PUBLIC TRUSTEE *v.* SHARMAN.

Solicitors: *Whitfield, Byrne & Dean; Blundell, Baker & Co., for Gordons, Bradford; Warwick Williams & Marchants; Minet, Pering Smith & Co.; Barnes & Butler.*

H. L. L.

---

ollowed. *Re* BIDIE (*decd.*). [1948] All E.R. 885.

Followed. *Re* BIDIE, DECD. [1948] Ch. 697

SIMONDS J.
1942
Apr. 21.

In re WOOLGAR.

WOOLGAR *v.* HOPKINS.

Divorce—Alimony—Arrears—Recovery—Death of husband—Claim for administration of estate—Matrimonial Causes Rules, 1937, *rr.* 62, 81.

A widow sought to recover arrears of alimony payable to her under an order of the Probate, Divorce and Admiralty Division in Divorce by taking out a summons in the Chancery Division for the administration of her husband's estate:—

Held, that the arrears were not recoverable in such proceedings and that the position had not been altered by the Matrimonial Causes Rules, 1937.

In re Hedderwick [1933] 1 Ch. 669 followed. *In re Stillwell* [1916] 1 Ch. 365 not followed.

ADJOURNED SUMMONS.

By an order of the Probate, Divorce and Admiralty Division in Divorce made in 1928, Robert Woolgar was ordered to pay to his wife permanent alimony at the rate of 120*l.* a year. He died on March 9, 1941, and his will, dated July 27, 1923, was proved by the executor on December 1, 1941. At the date of his death there were arrears of alimony owing to the wife, who took out a summons in the Chancery Division for the administration of the estate to recover the arrears.

Watmough for the applicant. The wife is entitled to an order for administration. There is a conflict of authority under the old rules: see *In re Stillwell* (1) and *In re Hedderwick* (2), the former being favourable to the wife's contention. If, however, the latter is preferred, it would no longer govern this case, as the position has been altered since that decision

(1) [1916] 1 Ch. 365.

(2) [1933] 1 Ch. 669.

SIMONDS J.
1942
WOOLGAR, *In re.*
WOOLGAR *v.* HOPKINS.

by the Matrimonial Causes Rules, 1937 (1), r. 81 of which now imports the Rules of the Supreme Court into matters relating to matrimonial causes. Consequently, Or. XLII., r, 24 (which provides: "Every order of the court or a judge "in any cause or matter may be enforced against all persons "bound thereby in the same manner as a judgment to the "same effect"), becomes applicable and the arrears of alimony can be enforced in the Chancery Division. Rule 81 also overrides r. 62 of the Matrimonial Causes Rules, 1937, which is merely a repetition of a former rule (i.e., Matrimonial Causes Rules, 1924, r. 79).

Vanneck for the executor of the will. The court will not accede to an application of this kind: *In re Hedderwick* (2). The position has not been altered by the Matrimonial Causes Rules, 1937.

SIMONDS J. The question which I have to determine is whether a person to whom arrears of alimony are due can maintain in this court a claim for administration as a creditor. Two points arise—first, that there is a conflict between *In re Stillwell* (3) and *In re Hedderwick* (2), both of which were decided under the Matrimonial Causes Rules which prevailed before 1937; secondly, whether the alteration contained in those rules has made any difference. In *In re Stillwell* (3) Sargant J. decided that: "where an order has been made "against a husband for judicial separation and for payment "of alimony his widow may recover against his estate, if solvent, "any arrears of alimony due at his death," but in *In re*

---

(1) Matrimonial Causes Rules, 1937, r. 62 (1.): "In default of payment to any person of any sum "of money at the time appointed "by any order of the court for "the payment thereof, a writ of "fieri facias, sequestration, or "elegit shall be sealed and issued "as of course out of the Divorce "Registry upon an affidavit of "service of the order and of "non-payment."

Rule 81: "Subject to the provisions of these rules and of any "statute, the rules of the Supreme "Court shall, notwithstanding "the provisions of Order 68 "thereof, apply with the necessary "modifications to the practice and "procedure in any matrimonial "cause or matter to which these "rules relate."

R. S. C. Or. LXVIII., r. 1: "Subject to the provisions of this "order, nothing in these rules, "save as expressly provided, shall "affect the procedure or practice "in any of the following causes "or matters . . . . (*d*) Procedure "for divorce or other matrimonial "causes."

(2) [1933] 1 Ch. 669.

(3) [1916] 1 Ch. 365.

SIMONDS J.

1942

WOOLGAR, *In re.* WOOLGAR *v.* HOPKINS.

Hedderwick (1) the same question came before Luxmoore J. who delivered a reserved judgment in which he came to the conclusion that an order for alimony, assuming that it was enforceable during the testator's lifetime, ceased to be so on his death, and that, consequently, the person who claimed alimony in that case was not entitled to recover anything against the testator's estate, whether the estate was solvent or insolvent. I am content to adopt both his reasoning and his conclusion. In my judgment, the arrears of alimony are not recoverable in the administration of the estate of a deceased person in this division, whether the estate is solvent or insolvent, and consequently the person who claims them cannot maintain an action for administration.

On the question whether any difference has been made by the alteration contained in the Matrimonial Causes Rules, 1937, the suggestion is that, in view of r. 81, a liability not hitherto provable in the administration of an estate is now provable. It is said that the result of r. 81 is to introduce the provisions of Or. XLII., r. 24, of the Rules of the Supreme Court under which an order for alimony made by the Divorce Court can be enforced, as if it were a judgment to the same effect and, therefore, by way of proof in the administration of the estate. But r. 81 begins with these words: "Subject to "the provisions of these rules," and I turn, therefore, to r. 62, which prescribes the way (and, as I think, the only way) in which an order of the Divorce Court may be enforced. That rule would be wholly unnecessary if the result of r. 81 was to substitute, as a means of enforcing the orders of the Divorce Court, the provisions of Or. XLII., r. 24, of the Rules of the Supreme Court. Accordingly, I have come to the conclusion that r. 81 has not made any difference in this respect, and that *In re Hedderwick* (1) must still be regarded as an authority. The application for administration must, therefore, be dismissed.

Solicitors: *Alfred Nisbet & Son; Radcliffes & Co.*

(1) [1933] 1 Ch. 669.

J. L. D.

In re MOORGATE ESTATES, LIMITED.

MOORGATE ESTATES, LIMITED *v.* TROWER.

UTHWATT J.
1942
Apr. 21.

Emergency legislation—Mortgage—Covenant by mortgagor to insure against war risks—Impossibility of performance—Alteration of law—Relief—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 *Geo.* 6, *c.* 41), *s.* 11.

The mortgagors of leasehold premises covenanted in the mortgage, dated March 25, 1936, to keep the premises insured against loss or damage by " missiles or projectiles from or fired at " aircraft." It becoming impossible to perform this covenant, notice was given to the mortgagors by the mortgagees requiring payment of the principal moneys. The mortgagors then began an action against the mortgagees for a declaration that they were not bound to comply with the notice. On December 15, 1939, Farwell J. held that the action failed ([1940] Ch. 206) and directed, on the mortgagees' counterclaim for the enforcement of their security, that an account be taken and a receiver be appointed. On August 7, 1941, s. 11 of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, which declared that existing and previous obligations to insure against war damage should be void, came into operation. The mortgagors thereupon applied in the action for an order that the counterclaim be discontinued:—

Held, that s. 11 was retrospective, and that the court, in the exercise of its discretion, would give complete relief to the mortgagors against the judgment in the action; that the account must not be proceeded with, and that the receiver must be discharged.

ADJOURNED SUMMONS.

By a mortgage dated March 25, 1936, certain leasehold premises were mortgaged by Moorgate Estates, Ld., to secure 155,000*l.*, the mortgagors covenanting to keep the premises insured against loss or damage by " missiles or projectiles "from or fired at aircraft." Shortly after the date of the mortgage it became impossible for the mortgagors so to insure the premises, and the mortgagees, contending that failure to do so was a breach of the covenant, gave notice requiring immediate payment of the principal moneys. The mortgagors thereupon began an action against the mortgagees for a declaration that they were not bound to comply with the notice. The mortgagees put in a defence and a counterclaim claiming to enforce the security by foreclosure or sale and asking for the appointment of a receiver. On December 15, 1939, Farwell J. held that the action failed, and, on the counterclaim, ordered that an account should be taken of what was due under the security and that a receiver should be appointed. On August 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, came into force and by s. 11 it was provided that any express obligation to insure land against war damage should be void and be deemed always to have been void (1). In view of the alteration in the law, the mortgagors took out a summons in the action for relief under s. 11, in which they asked for an order that the counterclaim be discontinued and that the account be not proceeded with and the receiver be discharged.

Wilfrid Hunt for the mortgagors. The order of Farwell J. no longer holds good, having regard to the change in the law effected by s. 11, which is retrospective and contemplates that the court will grant relief in a proper case. This application is made under that section for the proceedings to be discontinued on the ground that the covenant is void.

Jopling for the mortgagees. A final order having been made in the action before s. 11 came into operation, no order for relief ought to be granted. It cannot be said that the action is "pending at the passing of the Act" and the judgment cannot now be altered.

UTHWATT J. The first question which I have to consider is whether I have any jurisdiction to grant relief to the mortgagors. The outstanding fact is that s. 11 is clearly retrospective in every way, and, in my view, if this Act had been passed shortly after Farwell J.'s decision and an appeal had been made against that decision, the Court of

---

(1) Sect. 11 provides: "Any "express obligation to insure "land against war damage shall "be void and be deemed always "to have been void, and any "obligation to insure land against "fire or other risks shall be con- "strued as not including, and as "never having included, an "obligation to insure against war "damage, and any proceedings "pending at the passing of this "Act relating to any such obliga- "tion to insure land against war "damage shall be discontinued "upon such terms as the court "thinks just: Provided that the "foregoing provision shall not "affect the exercise before the "passing of this Act of any right "or remedy arising in conse- "quence of a failure to perform "an obligation to insure against "war damage, but the court may, "on the application of any person "prejudiced by the exercise of any "such right or remedy, grant such "relief as it thinks just."

Appeal would have been bound to have had regard to the change in the law which had taken place.

The proceedings in the action are not pending proceedings. A final order has been made and the part of the section relating to pending proceedings has no application to the question before me. The section, however, goes on to enact that the provision that an obligation to insure land shall be void and be deemed always to have been void—" shall not "affect the exercise before the passing of this Act of any "right or remedy arising in consequence of a failure to perform "an obligation to insure against war damage." Stopping there for the moment, where a right or remedy arising in consequence of a failure to perform an obligation has been exercised before the passing of the Act, the position is to stand. Then comes the qualification, " but the court may, "on the application of any person prejudiced by the exercise "of any such right or remedy, grant such relief as it thinks "just." It appears to me that the effect of the passage beginning with the word " but " is that the court is granted a discretion to give such relief as it thinks just, where there has been the exercise of a right or remedy before the passing of this Act arising in consequence of a failure to perform the obligation. That can only mean, I think, such relief as the court thinks just, having regard to the fact that it is now known that the obligation is void and is to be deemed always to have been void.

The result in my view, is that I have jurisdiction to grant relief against the position created by the judgment of Farwell J., and it seems clear that the case is one in which I ought to exercise that discretion. No rights have been created in third parties as the result of what has been done. There has been no foreclosure order absolute, or exercise of a power of sale arising by breach of a condition. All that has happened is that an account has been directed, a receiver has been appointed, and rents have been received in respect of the receivership order. Otherwise the position remains unaffected by the action. If ever there was a case where it was possible effectively to put right the position created by an alteration of law, it is this case, and I, accordingly, propose to exercise my discretion by giving to the mortgagors complete relief against the consequences of the judgment, subject only to one matter. Apart from any breach of the covenants contained in the mortgage, the mortgage moneys

UTHWATT J.

1942

MOORGATE ESTATES, LD., *In re.* MOORGATE ESTATES, LD. *v.* TROWER.

are not payable till March 25, 1946. The mortgage itself contains certain provisions as to the payment of 2000*l.* a year. I direct the mortgagors to pay 2000*l.* a year until the whole sum becomes payable.

Solicitors: *J. D. Langton & Passmore; Trower, Still & Keeling.*

J. L. D.

SIMONDS J.

1942

Apr. 22.

In re LESTER.

LESTER *v.* LESTER.

Will—Conditional gift—Shares in company—Personal liability—Charge.

A testator bequeathed shares in two companies to a legatee "subject to the payment by him" of certain annuities:—

Held, that a personal obligation was imposed on the legatee, on his assenting to the legacy, and that the words did not also create a charge on the subject-matter of the legacy.

In re Hodge [1940] Ch. 260 referred to.

ADJOURNED SUMMONS.

By his will, dated February 9, 1937, William Marklew Lester made the following provision: "I bequeath the remainder of "my shares [in two companies] to my said son Albert William "Lester subject . . . . (*c*) To the payment by him to my "said son Alfred John Lester during his lifetime of the sum of "8*l.* per week; (*d*) to the payment by him after the death "of the said Alfred John Lester of the sum of 6*l.* per week "to the widow of the said Alfred John Lester during her "lifetime or until her remarriage; (*e*) to the payment by him "(after the death of the survivor of the said Alfred John "Lester and his wife or after her remarriage as the case may "be) to their daughter Dorothy Louise Lester during her "lifetime or until her marriage of the sum of 2*l.* per week." The testator died on December 21, 1940. A summons was taken out by Albert William Lester, who was also one of the executors of the will, to determine whether a charge was created, by the provision in the will, on the shares, in favour of the annuitants. He admitted that the words of the clause imposed, on his assenting to the legacy, a personal obligation on him to make the prescribed payments.

Fawell, for Albert William Lester. Cases dealing with conditional legacies may be divided into three classes: (*a*) those which create a charge on the property; (*b*) those which create a personal liability and (*c*) those which declare a trust, such as *Rees* v. *Engelback* (1). In a few cases both a personal liability and a charge on the property have been held to be created: see *In re Cowley* (2); *In re Oliver* (3). The latter case shows the distinction between a condition implying a trust and one creating a charge. Here there is a personal liability, but the legacy of the shares is not charged with the annuities. The words are "subject to the payment by him" and they suggest a condition. The effect is that, when the legatee accepts the bequest, the condition is turned into a contract. To take a gift subject to a condition is to take it subject to a personal liability and no more.

Salt for the annuitants. There is a personal obligation on the plaintiff to pay the annuities, but there is nothing to show that a charge is excluded. The annuitants have two remedies—a personal remedy and a right to have the shares applied in payment of their annuities. He referred to *In re Hodge* (4). In *Welby* v. *Rockcliffe* (5) it was held that there was both a personal liability and a charge. He also referred to *Wright* v. *Wilkin* (6); *In re M'Mahon* (7) and *Duffy* v. *Duffy* (8).

Fawell replied.

Waite and *Hayward* for other parties interested.

SIMONDS J. Various authorities have been cited to me and the result of them is, in my judgment, that it must be a question of construction in each case whether an obligation or a charge is created or whether both are created. I find it difficult to construe such words as those in this case as creating both a personal obligation and a charge. There may be words which create both, as in *Welby* v. *Rockcliffe* (5) and *Wright* v. *Wilkin* (6), where the language does not admit fairly of any other conclusion than that there was both a personal obligation and a charge. In *Rees* v. *Engelback* (1) the language was such as to create a personal obligation and there are two Irish cases, *In re M'Mahon* (7) and *Duffy* v. *Duffy* (8), where language was used which was apt to impose a personal

(1) (1871) L. R. 12 Eq. 225.
(2) (1885) 53 L. T. 494.
(3) (1890) 62 L. T. 533.
(4) [1940] Ch. 260.
(5) (1830) 1 Russ. & My. 571.
(6) (1860) 7 Jur. N. S. 441.
(7) [1901] 1 I. R. 489.
(8) [1920] 1 I. R. 122.

SIMONDS J.

1942

LESTER, *In re.* LESTER *v.* LESTER.

obligation but not to create a charge. In *Rees* v. *Engelback* (1) the testator had devised his business to his trustees on trust to allow his son to carry it on "upon the terms and conditions "following"—i.e., that he should pay certain annuities, and the only question was whether his son, having accepted the legacy, had incurred a personal liability; and the Vice-Chancellor said (2): "Now, upon the authority of the case "of *Messenger* v. *Andrews* (3), and even without the authority "of that case, upon very plain principles of justice and law, "the defendant, who admits that he has enjoyed the benefit "given to him by a will upon the conditions expressed in it, "is under a personal liability, which can be enforced in this "court, of fulfilling those conditions." It is true that in the bill the plaintiff had claimed a declaration that the annuities were by the will charged on the business, but that question was not ventilated. In *In re Hodge* (4) a testatrix devised to her husband, who was her executor and sole residuary legatee, certain freehold property in consideration of his paying her sister 2*l.* a week for life. There it will be observed that a condition was introduced by the words "in consider-"ation of," and the judge came to the conclusion that there was a personal obligation on the husband, if he accepted the devise. I think there is very little difference between a bequest "in consideration of" and a bequest "subject to" the payment by the legatee of certain sums. In either case the words are apt to create a personal obligation. On the other hand, where there is no reference to the legatee as the person by whom the payment is to be made, but the property is merely given subject to the payment of a certain sum, it may well be that the effect is to create a charge on the property but not to impose a personal obligation on the legatee. The distinction is a fine, but, I think, a real one. Here where it is rightly, in my view, conceded that a personal obligation is imposed on the legatee to make the payment, I see no ground for saying that in addition a charge is created.

I must refer to two other cases that were cited to me. In *In re Cowley* (5) a testator gave all his interest in certain leasehold premises to his son, subject to payment of all his debts, funeral and testamentary expenses. The son accepted

(1) L. R. 12 Eq. 225.

(2) Ibid. 237.

(3) (1828) 4 Russ. 478.

(4) [1940] Ch. 260.

(5) 53 L. T. 494.

the bequest and it was held that he must be deemed to have accepted it, but was not personally liable to pay the debts, funeral or testamentary expenses. In his judgment Kay J. says: "In the absence of authority, I am not prepared to "say that the gift of specific legacies contained in the present "will, 'subject to payment of debts, funeral and testamentary "'expenses,' means anything but that the testator gives this "property and the other property subject to payment of his "debts, funeral and testamentary expenses. It does not seem "to me at all intended that, whether or not the property is "enough, the legatee is to pay the debts." From the passage that follows it is clear that the learned judge is assuming that the words under consideration were apt to create a charge on the property of the debts, funeral and testamentary expenses. He goes on: "It is commonly expressed in very "different terms—'he paying the debts.' Here I take the "words only as amounting to a charge by the testator between "that property and the other property. I think that the "testator's son must be deemed to have elected to accept "the legacies, subject to payment of the debts, funeral and "testamentary expenses, but that he is not personally liable "to pay such debts, funeral or testamentary expenses, or any "part thereof." The opening word "It" in the passage last cited means "the intention that, whether or not the "property is enough, the legatee is to pay the debts." The learned judge does not in so many words say that in that case a charge would not be created, but he is clearly contrasting the two cases of charge and personal liability. The other case is *In re Oliver* (1). There the testator gave his real estate at North and South Collingham and his residuary estate to his nephew "he also paying thereout the following legacies ". . . ." but later referred to the legacies as "charged on my "Collingham estate." Chitty J. held that the words "he "also paying thereout the following legacies . . . ." would by themselves have been apt to create a trust (he does not use the words "personal obligation"), but as the testator had referred to the legacies as "charged" on the Collingham estate, he was constrained to hold that a charge only, not a trust, was created. He was, I think, clearly of opinion that such an expression could not carry the double burden of creating a charge and imposing a personal obligation. So also in the present case, since it is clear that a personal obligation is

(1) 62 L. T. 533.

SIMONDS J.

1942

LESTER, *In re.*

LESTER *v.* LESTER.

imposed on the legatee, on his assenting to the legacy, I should not be justified in saying that the words in question also create a charge on the subject-matter of the legacy.

Solicitors: *Rider, Heaton, Meredith & Mills, for Lenton Lester & Co., Walsall; Joynson-Hicks & Co.*

J. L. D.

---

istinguished. *Re* EDWARDS' WILL RUSTS. [1948] 1 All E.R. 821.

Distinguished. *Re* SCHINTZ'S WILL TRUSTS. [1951] 1 All E.R. 1095.

Distinguished. *In re* SCHINTZ'S WILL TRUSTS [1951] 1 Ch. 870

SIMONDS J.

1942

Mar. 20; *Apr.* 24.

In re JONES.

JONES *v.* JONES.

Will — Construction — Legacy — Incorporation — Existing document or future document which may be substituted—Validity.

A testator directed his trustees to pay a legacy of 1000*l.* to "the T. College Investment Trustees appointed or to be "appointed under special declaration of trust for the benefit of "T. College or otherwise as therein contained executed by me "bearing even date with this my last will and testament or any "substitution therefor or modification thereof or addition thereto "which I may hereafter execute":—

Held, that, if effect were given to such a direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the provisions of the Wills Act; and that the gift failed for uncertainty.

In re Keen [1937] Ch. 236 applied.

ADJOURNED SUMMONS.

By his will dated March 5, 1901, William Highfield Jones directed his trustees to pay a legacy of 1000*l.* to the "Tettenhall "College Investment Trustees appointed or to be appointed "under special declaration of trust for the benefit of Tettenhall "College or otherwise as therein contained executed by me "bearing even date with this my last will and testament or "any substitution therefor or modification thereof or addition "thereto which I may hereafter execute." By a deed poll of even date he declared the trusts on which the said sum was to be held. The testator died on March 25, 1903, and his will was proved on May 27, 1903. The legacy did not become payable until after the death of a beneficiary on September 27, 1940.

A summons was taken out by the trustees of the will to determine whether the legacy was a valid gift, having regard to the fact that it was a gift by reference to an existing

SIMONDS J.

1942

JONES, *In re.* JONES *v.* JONES.

ascertainable document or to a document which might in the future be substituted therefor.

G. D. Johnston for the trustees of the will.

Waite, for the residuary legatees. The bequest is invalid, as the testator is reserving the power to alter the disposition by means of future documents which do not conform to the provisions of the Wills Act. *In re Keen* (1).

Rawlence for the Tettenhall College trustees.

Guest Mathews for the surviving trustee of the deed of declaration of trust. In certain circumstances a deed can be virtually incorporated in a will: *Singleton* v. *Tomlinson* (2). The testator might have altered the trusts affecting the legacy in some respects, but he did not reserve power to take it away from the College and he could not have done so, on these documents. He has included this legacy in a list of charitable legacies and has definitely incorporated the deed in the will. He has constituted by the two documents a valid charitable trust and has not, in fact, attempted to alter that trust.

Danckwerts for the Attorney-General.

Cur. adv. vult.

1942. Apr. 24. SIMONDS J. The question which I have to determine is whether this is a valid gift to trustees to be held by them on the trusts of the declaration of trust of even date with the will which has been, as I hold, clearly identified and proved. It is clear that a gift in a testamentary document, by reference to a then existing and identifiable document, may be valid. The former document is incorporated in the latter; and may be, though, indeed, not necessarily, admitted to probate.

It is equally clear that a gift in a testamentary document may be made by reference to other documents in such terms as to exclude parol testimony; as where it is to papers not yet written, or where the description is so vague that it is incapable of being applied to any document in particular. Such a gift is clearly bad: *Allen* v. *Maddock* (3).

A third case is where, as here, in the testamentary document there is a gift by reference to an existing ascertainable document, or to a document which may in the future be substituted therefor.

---

(1) [1937] Ch. 236.

(2) (1878) 3 App. Cas. 404.

(3) (1858) 11 Moo. P. C. C. 427, 454.

In regard to such a gift, two different contentions are put forward. On the one hand, it is urged that the existing document must be admitted in evidence and incorporated in the testamentary document; and, this having been done, the rest of the reference must be disregarded. There is then a valid gift in the terms of the incorporated document. The court is not entitled, or concerned, to inquire whether there was a later document.

On the other hand, it is urged that the whole gift must be treated as invalid, on the ground that the testator's testamentary intention can only be ascertained by evidence outside the will itself, both in regard to documents existing at the time of the will and to those coming into existence thereafter; and that, since such evidence cannot be admitted about the latter, it ought not to be admitted about the former.

I think that the second contention is the right one; and, though I have been unable to find any case in which the question has come before the court in this neat form, I shall refer to certain authorities which appear to support the conclusion to which a consideration of principle leads me.

The function of a court of construction is to ascertain the testator's testamentary intention from the language which he has used in his will, with the aid of such extrinsic evidence as is admissible. Finding on the face of the will the clear statement of the testator's wish that a sum of money is to be held on the trusts of a specified existing document, or of such a document as may be substituted therefor, I do not know of any principle which compels me to disregard the second alternative, and say that the testator's will is that the sum of money is to be held on the trusts of the first alternative. A partial admission of evidence to ascertain the testamentary intention, admitting it as to the first alternative, but excluding it as to the second, does not appear to me to be justified. In other words, if the testator's will is not adequately stated in the testamentary document itself and cannot as a whole be ascertained by admissible evidence, effect cannot be given to parts only of it. The rule which admits evidence of an ascertainable existing document is based on the presumption that, by such admission, effect will be given to the testamentary intention of the testator. But to admit such evidence alone, where the gift is in such an alternative form as we have here, may well result in the defeat of his intention.

It is, in my judgment, immaterial whether, if evidence about subsequent documents were admitted, it would appear that there were or were not such documents. The question is one of principle, and, as it appears to me, must be answered by saying that, where evidence is not admissible to make clear the whole testamentary intention, it is not admissible to make clear part of it.

The same result may be reached in a slightly different way by saying that, since the testator has expressed his intention in two alternative forms and evidence is not admissible to ascertain the second alternative, the gift as a whole must fail for uncertainty.

I must add, for the sake of clarity, that a somewhat different form of words in the gift may lead to a different conclusion. If, for instance, the testator directs his trustees to hold a sum of money on the trusts of an existing identifiable document, unless he substitutes some other document therefor, it may be that evidence is admissible to show whether or not he has purported to substitute a new document, and that the original gift will stand or fall accordingly; though in no event could the trusts of the new document have testamentary validity. In such a case, the substitution of a new document might perhaps be treated like any other event or condition mentioned by the testator; as, for example, "unless I shall before my death have gone to Rome." That is clearly distinguishable from the present case.

I turn to the relevant authorities. In *University College of North Wales* v. *Taylor* (1), the Court of Appeal held that, on the true construction of the will under review, the relevant gift was to be construed as if the testator had said: "Upon "such trusts and conditions, and subject to such rules and "regulations, as shall be found contained and specified in any "existing or future memorandum amongst my papers written "or signed by me." Lord Cozens-Hardy M.R. says (2): "That, in my view, is the true meaning and construction of "this gift. I cannot read it as meaning 'upon the trusts "'and upon the terms specified in any one existing document "'unless and until I may alter it by some other document "'which I may execute at some future time.' Whether such "a gift would or would not be valid I do not pause to consider, "but I am entirely unable to accept that view of the con-"struction." In this case I have followed the prudence of the learned Master of the Rolls by not expressing any view on the validity of such a hypothetical gift. The Master of the Rolls says later (1): "But, having regard to the importance "and interest of the case, we thought it right de bene esse "to listen to what the parol evidence was; and, speaking "for myself, if I had any doubt before I think that if that "parol evidence had been considered it would have made it "still more impossible to support the view that this "memorandum could have been incorporated in the will, "because it is quite plain that the testator's wish and intent "was that his trusts should be found, not merely in the then "existing memorandum which was before him, but in some "subsequent future memorandum or memoranda which he "contemplated and intended to execute, and which he meant "to incorporate." Then Moulton L.J. says this (2): "The "respondents to this appeal do not contest that the testator "intended to reserve to himself the power of making future "memoranda setting forth the conditions under which these "legacies were to be enjoyed. But they suggest that because "there was one document in existence at the date of the "will which answers the description in the will that document "is entitled to probate although future documents of the same "kind would not be. I should require a good deal of "persuasion to induce me to accept that doctrine but before "they can avail themselves of it they must prove that a "document precisely answering the description was then in "existence."

---

(1) [1908] P. 140.

(2) Ibid. 144.

Finally, in the same case (3), Farwell L.J. makes this observation: "Apart from that, reading the words fairly, "I find it impossible to doubt that the words 'as are contained "'and specified in any memorandum amongst my papers "'written or signed by me relating thereto' do not refer to "any particular document, but refer to any number of "documents which may or may not answer the description "of being written, or in the alternative signed, and which "may or may not be in existence. So far as regards the word "'are' is concerned, it is well settled that in wills it may well "point to futurity, and I cannot doubt that the testator "in using those words has intended to reserve to himself the "right to declare from time to time the rules and regulations "and the trusts which he desires to apply to his gift. If this

---

(1) [1908] P. 145.
(2) Ibid. 146.
(3) Ibid. 147.

"is decided to be the true construction of the words, it is "obvious that parol evidence cannot be admitted in order to "contradict that which has already been held to be the "meaning of the words. I am not sure that I have altogether "followed the grounds on which the learned President did "admit it; but we have heard it de bene esse, and I can only "say that the impression produced on my mind is this, that "it is exceedingly fortunate that the rule is as it is, because "we should be defeating the intention of the testator in this "particular case if we gave effect to a memorandum which, "on the evidence if it were admissible, he did not intend to be "final but intended to alter."

These observations appear to me strongly to support the conclusion to which I have come; and are only short of direct authority binding on me because, in that case, it was clear, on the face of the will, that the existing document, even if identifiable, was an incomplete statement of the testator's wishes; and was intended to be supplemented by other documents; whereas, in the present case, the existing document was in itself complete, and might remain the sole repository of the testator's wishes.

I next refer to *In re Keen* (1). In that case the testator had, by cl. 5 of his will, made a gift to A. and B. of 10,000*l.* free of duty, "to be held upon trust and disposed "of by them among such person, persons or charities as may "be notified by me to them or either of them during my life-"time and in default of such notification" as therein mentioned. The Court of Appeal was of opinion that, on their true construction, those words could only be construed as referring to a definition of trusts which had not yet, at the date of the will, been established and which between that date and the date of the testator's death might or might not be established. Lord Wright M.R. in his judgment says (2): "Mr. Roxburgh has strenuously argued, basing himself in "particular on the word 'may,' that the clause even though "it covers future dispositions, also includes a disposition "antecedent to or contemporaneous with the execution of "the will. I do not think that even so wide a construction "of the word 'may' would enable Mr. Roxburgh's contention "to succeed, but in any case I do not feel able to accept it." This last sentence may be considered dictum only; but it is re-affirmed later, when, after citing the speech of Lord

---

(1) [1937] Ch. 236.

(2) Ibid. 243.

SIMONDS J.
1942
JONES, *In re.*
JONES *v.* JONES.

Sumner in *Blackwell* v. *Blackwell* (1) stating that: "A "testator cannot reserve to himself a power of making future "unwitnessed dispositions by merely naming a trustee and "leaving the purposes of the trust to be supplied afterwards, "nor can a legatee give testamentary validity to an unexecuted "codicil by accepting an indefinite trust, never communicated "to him in the testator's lifetime," the Master of the Rolls says (2): "As in my judgment clause 5 should be considered "as contemplating future dispositions and as reserving to "the testator the power of making such dispositions without "a duly attested codicil simply by notifying them during his "lifetime, the principles laid down by Lord Sumner must be "fatal to the appellant's claim. Indeed, they would be "equally fatal even on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or "contemporaneous notifications as well as future notifications." It is true that, in the case under review, the reference was not necessarily to a document, since notification might have been oral. But I do not think that there can be any difference in principle between the two cases. The question is whether evidence is admissible to prove what is the document or the notification referred to: and the decision is that such evidence is not admissible if on its true construction the reference is to notification both future and anterior or contemporaneous. As the Master of the Rolls points out, if effect is given to such a direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil; and s. 9 of the Wills Act would be violated.

The same observation could with equal force be made about the bequest which I have to consider: the testator's intention was that subsequent declarations should have testamentary validity, though they might not satisfy the formal requirements of the Wills Act. That intention must, however, fail. It appears to me that this is, in effect, another way of stating the conclusion to which I have come. A bequest in the terms of that before me is invalid, as evidence cannot be admitted Sp.
to establish the first but not the second of two alternatives which together are the expression of the testamentary intention, because, if evidence is admitted to establish the first but not the second alternative, the testator's intention as a whole cannot be ascertained. The gift must then fail

---

(1) [1929] A. C. 318, 339.

(2) [1937] Ch. 246.

SIMONDS J.

1942

JONES, *In re.*

JONES *v.* JONES.

for uncertainty, because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

I must, accordingly, declare that the gift fails.

Solicitors: *Field, Roscoe & Co., for Minshall, Pugh & Co., Oswestry; Sharpe, Pritchard & Co., for Underhill, Willcock & Taylor, Wolverhampton; Miller & Smiths, for Shelton, Wearing & Bates, Wolverhampton; Treasury Solicitor.*

J. L. D.

In re PARSONS.

PARSONS *v.* ATTORNEY-GENERAL.

FARWELL J.

1942

May 7.

Revenue — Will — Legacy — Disclaimer — Estate duty — "Competent to "dispose of"—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2; *s.* 22, *sub-s.* 2 (*a*).

A testatrix by her will gave 10,000*l.* 2½ per cent. consolidated stock to her husband absolutely free from all death duties. She directed her trustees to pay the income of her residuary estate to her husband for life and after his death to stand possessed of the residuary trust funds in trust for her son absolutely. She died on June 20, 1937, and the estate duty then payable (including that attributable to the 10,000*l.* stock) was duly paid. The husband formally disclaimed the legacy by a deed of disclaimer. After his death (on August 31, 1940) the Estate Duty Office claimed estate duty in respect of the 10,000*l.* stock on the ground that, notwithstanding the disclaimer, he was during the continuance of the settlement competent to dispose of the property:—

Held, that, on the death of the testatrix, the husband became in a position to deal with the money and chose to dispose of it by disclaiming the legacy; and that the duty was payable.

Townson v. *Tickell* (1819) 3 B. & Ald. 31 considered and distinguished.

ADJOURNED SUMMONS.

By her will dated June 29, 1933, Jane Birch Parsons gave 10,000*l.* 2½ per cent. consolidated stock to her husband "absolutely free of all duties," and she directed her trustees to stand possessed of her residuary estate in trust to pay the income thereof to her husband for life and after his death to stand possessed of the residuary trust funds in trust for her son for his own use absolutely. She died on June 20, 1937, and her will was proved on September 24, 1937.

On the death of the testatrix the estate duty then payable (including that attributable to the 10,000*l.* stock) was duly paid, and, by virtue of s. 5, sub-s. 2, of the Finance Act, 1894 (1), and s. 14 of the Finance Act, 1914, no estate duty became payable on the death of the husband in respect of his wife's residuary estate or any part thereof, unless the husband was "during the continuance of the settlement "competent to dispose of it."

By a deed of disclaimer dated February 24, 1938, the husband formally disclaimed the legacy, which thereupon became part of the wife's residuary estate. He died on August 31, 1940. On his death the Estate Duty Office claimed estate duty on the 10,000*l.*

A summons was taken out by the trustees of the will of the testatrix to determine whether, the husband having disclaimed the legacy, the estate duty was payable.

J. V. Nesbitt for the trustees of the will of the testatrix. The husband having disclaimed, the money became part of the residuary estate of the testatrix. No estate duty is payable on the husband's death, on that residuary estate, having regard to s. 5, sub-s. 2, of the Finance Act, 1894, and s. 14 of the Finance Act, 1914, because it was paid on the death of the testatrix and the sum paid included an amount attributable to the 10,000*l.* stock: Hanson on Death Duties, 8th ed., pp. 103, 254. The husband, having regard to his disclaimer, was never "competent to dispose of" the property within the definition of that phrase in s. 22, sub-s. 2 (*a*), of the Finance Act, 1894: Hanson on Death Duties, 8th ed., p. 203. He was neither competent to do so during the continuance of the settlement nor after the disclaimer. The Estate Duty Office take the view that the disclaimer did not become operative until the date of the deed of disclaimer. That is not correct; the statement in Davidson's Forms of Conveyancing, 3rd ed., vol. v., part 2, p. 661 (note), shows that the disclaimer relates back to the date of the gift. He referred to Halsbury's Laws of England, 2nd ed., vol. xxxiv., p. 123, para. 157: *Mallott* v. *Wilson* (1); *Townson* v. *Tickell* (2); *Peppercorn* v. *Wayman* (3). In *In re Wimperis* (4) the gift became in effect null and void. The will must be read as if it never contained the gift.

---

(1) Finance Act, 1894, s. 5, sub-s. 2: "If estate duty has "already been paid in respect of "any settled property since the "date of the settlement, the "estate duty shall not . . . . be "payable in respect thereof, until "the death of a person who was "at the time of his death or had "been at any time during the "continuance of the settlement "competent to dispose of such "property."

Sect. 22, sub-s. 2 (*a*): "A "person shall be deemed com"petent to dispose of property "if he has such an estate or "interest therein or such general "power as would, if he were "sui juris, enable him to dispose "of the property . . . . and the "expression 'general power' in"cludes every power enabling "the donee . . . . to appoint or "dispose of property as he thinks "fit, whether exercisable by in"strument inter vivos or by will, "or both . . . ."

Finance Act, 1914, s. 14: "Any relief from the payment "of estate duty given by sub-s. 2 "of s. 5 . . . . of the Finance Act, "1894, ... shall cease in the "case of any person dying after "August 15, 1914 . . . . Provided "that nothing in this section shall "affect the relief given by the "above-mentioned provisions of "the Finance Act, 1894, in cases "where, before or after the "passing of this Act, estate duty "has been paid . . . . upon the "death of one of the parties to a "marriage, so far as respects the "payment of estate duty on the "death of the other party to the "marriage."

J. H. Stamp for the Attorney-General. The legatee had power to dispose of this property. He had the right to accept it, which arose immediately on the death of the testatrix and, in order not to accept it, he was obliged to manifest an intention not to do so. He referred to *Mallott* v. *Wilson* (1) and *In re Young* (5). As to the definition of a power to dispose see *Attorney-General* v. *Quixley* (6).

FARWELL J. On the one hand, it is said that the disclaimer of the legacy by the husband must be treated as having operated ab initio, with the result that the position is the same as it would have been if the will had never contained the legacy and the 10,000*l.* had from the first formed part of the residuary estate. On the other hand it is said that, although the husband disclaimed the legacy, he nevertheless was competent to dispose of the property comprised in it; and the question really turns on the meaning of s. 22, sub-s. 2 (*a*), of

(1) [1903] 2 Ch. 494.
(2) 3 B. & Ald. 31.
(3) (1852) 5 de G. & Sm. 230.
(4) [1914] 1 Ch. 502.
(5) [1913] 1 Ch. 272.
(6) (1929) 141 L. T. 288.

FARWELL J.

1942

PARSONS, *In re.* PARSONS *v.* ATTORNEY-GENERAL.

the Finance Act, 1894, which defines what is meant by the words "competent to dispose of."

Certain authorities were cited from which it is clear that judges took the view that renunciation had the effect of making the gift void ab initio. The case specially relied on was *Townson* v. *Tickell* (1) and in that case Abbott C.J., in his judgment, said: "The law certainly is not so absurd as to "force a man to take an estate against his will. Prima facie "every estate, whether given by will or otherwise, is supposed "to be beneficial to the party to whom it is so given. Of that, "however, he is the best judge, and if it turn out that the party "to whom the gift is made does not consider it beneficial, the "law will certainly, by some mode or other, allow him to "renounce or refuse the gift. The question here is in what "mode that refusal is to be made. In this case the renunciation "has been by deed under the hand and seal of the party. It "has been argued, however, that nothing short of renunciation "or disclaimer in a court of record will avoid the devise; and "if there had been any distinct authority to that effect we "should have been bound to give due weight to such authority." Then the judge goes on to point out that there is no authority which requires a disclaimer to take place in a court of record, and he comes to the conclusion that the renunciation, having been made by deed, must have the effect of making the devise null and void.

Bayley J. in his judgment says: "The effect of that is that "the estate never was in him at all. For I consider the devise "to be nothing more than an offer which the devisee may "accept or refuse, and if he refuses, he is in the same situation "as if the offer never had been made; and that being so, I "am of opinion that the disclaimer, in this case, was sufficient."

Holroyd J. is of the same opinion, and says: "I think that "an estate cannot be forced on a man . . . . The law presumes "that he will assent until the contrary be proved; when the "contrary, however, is proved it shows that he never did "assent to the devise and consequently that the estate never "was in him."

In my judgment that authority does not go nearly far enough to assist the plaintiff here. The will had taken effect immediately on the testatrix's death, and the effect was that the husband was entitled to a sum of 10,000*l.* 2½ per cent. consolidated stock. He was under no obligation to accept

(1) 3 B. & Ald. 31.

FARWELL J.

1942

PARSONS, In re.

PARSONS v. ATTORNEY-GENERAL.

that gift, and, as is said in the case I have just referred to, the law is not so absurd as to enforce on him the obligation to accept it if he did not wish to do so; and by disclaiming it orally or in writing he was in a position to refuse to have anything to do with the gift.

But that, in my judgment, is not the solution of the question whether the husband was at any time after the death of his wife competent to dispose of this property. In my judgment he was competent to dispose of the property, although he was also competent to refuse to accept it or to have anything to do with it.

In my opinion, notwithstanding the language in some of the cases, it is not possible to treat a gift by will as if it were an offer open to the legatee to accept or refuse. A gift under a will takes effect immediately on the death of the testator and the donee is entitled to say: "I will not have the gift; "I do not want it." If he takes that line, he is entitled to rid himself of the benefit which the testatrix desired to give him. If he does so in this particular case, the 10,000*l.*, which would otherwise have been his property to dispose of as he thought fit, ceases to be property of which he was competent to dispose and becomes part of the residuary estate; but, in my judgment, there was a time (it may be a very short time) during which the husband was competent to dispose of this property, and, the will having given this legacy, the husband became in a position to deal with the money and was competent to dispose of it. He chose to dispose of it by refusing to take it; nevertheless he was competent to take it and dispose of it.

Accordingly, in my judgment, the revenue is entitled to estate duty on this 10,000*l.* on the death of the husband.

Solicitors: *Vizard, Oldham, Crowder & Cash; Solicitor of Inland Revenue.*

J. L. D.

C. A.
1942
May 13.

In re LEICESTER TEMPERANCE AND GENERAL PERMANENT BUILDING SOCIETY'S APPLICATION (GOUGH).

Emergency legislation—Mortgage—Appointment of receiver—Relief—" Person liable . . . . to perform the obligation "—Assignee of equity of redemption—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*) ; *sub-s.* 4.

An assignee of the equity of redemption is not a " person liable " . . . . to perform the obligation " within the meaning of s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939, and, therefore, when a mortgagee applies, under sub-s. 2 (*a*) (ii.), to the appropriate court for leave to appoint a receiver, the assignee is not a proper respondent to the application, not being entitled to any relief under the Act.

Semble, casus omissus in the Act.

In re Woolwich Equitable Building Society's Application (*Haywood*), ante p. 253, approved.

APPEAL from Morton J.

In June, 1938, Gough mortgaged certain properties to the mortgagees, the Leicester Temperance and General Permanent Building Society. By an agreement, dated January 20, 1939, he agreed to sell the properties to Smith Brothers (Swansea), Ld., who re-sold them to another company, Acacia Estates, Ld., whose representative agreed with Gough to guarantee the repayment of the mortgages and the observances of the covenants contained therein, and to indemnify Gough against any claims by the building society.

On January 30, 1942, Gough transferred the mortgaged properties to Acacia Estates, Ld., subject to the mortgages and sums thereby secured. With the transfer there was a covenant by Acacia Estates, Ld., and its representative with Gough to pay all moneys payable under the charges and to observe the covenants therein contained. There was also a covenant to keep Gough indemnified in respect of the charges. The mortgagees were not parties to the transfer. On December 24, 1941, they took out a summons under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, asking leave to proceed to exercise any remedy available to them by way of appointing a receiver of the mortgaged properties. Gough was the only respondent named by the mortgagees. Acacia Estates, Ld., attended before the master, and asked to be heard, contending that they came within the provisions of s. 1, sub-s. 4, of the Act as being "the "person liable . . . . to pay . . . . the debt or to perform the "obligation in question" and that they were unable to do so by reason of circumstances attributable to the present war. The master decided that he could not hear either Gough or Acacia Estates, Ld., but, at the request of Acacia Estates, Ld., he adjourned the summons. Morton J. directed in chambers that Acacia Estates, Ld., should be joined as respondents, and adjourned the summons into court as a procedure summons.

Morton J. held that the case could not be distinguished from *In re Woolwich Equitable Building Society's Application* (*Haywood*) (1), and that, therefore, the words in sub-s. 4 did not apply to Acacia Estates, Ld., but he ordered them to be joined as respondents if they desired, for the purpose of testing the decision in the *Woolwich* case (1) in the Court of Appeal. Acacia Estates, Ld., appealed.

Crispin for Acacia Estates, Ld. The short point in this case is whether the assignee of an equity of redemption is a person who is liable to perform an obligation within the meaning of s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939. In *In re Hearts of Oak Building Society's Application* (2) the trustee in bankruptcy of the assignee of the equity of redemption was made respondent. The relief here sought is on the property and not on a person, and Gough is not interested in the property: *National Provincial Bank, Ld.* v. *Liddiard* (3). The Act is for the protection of debtors, and the appellants ought to be given all the protection to which they can prove they are entitled. He also cited *In re Midland Bank, Ld.'s Application* (4).

Belsham for the mortgagees was not called on.

Lord Greene M.R. This appeal raises a point which is one of a group of points in respect of which decisions have been given in the Chancery Division. I propose in this judgment to deal only with the particular question before us and not to canvass the other decisions in that group.

Acacia Estates, Ld., are the present owners of the equity of redemption in mortgaged property of which the respondents are the mortgagees. They acquired the equity at a date subsequent to the passing of the Courts (Emergency

(1) Ante p. 253.
(2) [1942] W. N. 21.
(3) [1941] Ch. 158.
(4) Ante p. 61.

Powers) Act, 1939—that is, taking the date of the transfer—but upon a statement by Mr. Crispin on their behalf it is accepted on both sides that we are to deal with the case upon the footing that previously to the commencement of the Act they became interested in the equity in this way. There was a contract to acquire the equity from the original mortgagor, Mr. Gough, which was made on January 20, 1939. The purchaser under that contract was a company called Smith Brothers (Swansea), Ld., and the contract contained covenants to discharge the obligations under the mortgages and to indemnify Mr. Gough, the mortgagor. Morton J. seems to have proceeded on the footing that the contract was made by Smith Brothers (Swansea), Ld., as nominees for the present appellants. With respect, on the evidence, I cannot think that that view is justified; but Mr. Crispin's statement was to the effect that between the date of that contract and the commencement of the Act Acacia Estates, Ld., agreed with Smith Brothers (Swansea), Ld., to take over their contract with Gough on the footing that they covenanted with Smith Brothers to perform their obligations to Gough. Therefore, at the second remove, so to speak, Acacia Estates, Ld., became indirectly liable to see that the mortgage interest payments were kept down. Taking that as the position (and it is accepted by counsel on behalf of the respondents that we shall deal with it on that basis), it does not seem to me that the case is any different from what it would have been if Acacia Estates, Ld., had contracted direct with the mortgagor to acquire the equity of redemption before the commencement of the Act and had covenanted to indemnify the mortgagor and to carry out his obligations under the mortgages.

The mortgagees are desirous of enforcing a remedy in the form of the appointment of a receiver, owing to default, I suppose, in the performance of the obligations contained in the mortgage deeds. They took out the usual application and Acacia Estates, Ld., obtained an order adding them as parties to that summons. The summons then came before Morton J. The first matter that fell to be decided was whether or not Acacia Estates, Ld., were entitled to the relief which the Act grants, and the learned judge held that they were not—following a previous decision of Farwell J. If they were not parties entitled to relief, on the true construction of the Act, it would of necessity follow that they would not have been proper parties to the application because there can be no point in making parties to an application persons to whom the Act extends no relief. But the substantive question is whether or not Acacia Estates, Ld., fall within the class of persons to whom relief is given by the Act.

The Act in s. 1, sub-ss. 1 and 2, prohibits the taking of certain steps without the leave of the court, and by sub-s. 4 provides that if, on any application for such leave as is required under the section for the exercise of any of those rights or remedies, the appropriate court is of opinion that the person liable to satisfy the judgment or order or to pay the rent or other debt or to perform the obligation in question is unable immediately to do so by reason of circumstances arising out of the war, and so forth, the court may refuse leave for the exercise of the right. In the present case it is said that Acacia Estates, Ld., are persons liable to perform the obligation, and they propose to show, if that view be right, that they are unable to perform the obligation by reason of circumstances arising out of the war. They are, of course, not entitled to put in evidence of their inability to do anything but perform the obligation, and if they are not the persons who are liable to perform the obligation they have no interest in the matter at all, so far as the Act is concerned. The sole question, therefore, is whether they fall within that description.

In order to construe that language it is helpful to look back at the place where the phrase "performance of an obligation" first appears. It is to be found in the proviso to s. 1, sub-s. 2; and it is under that sub-section that the application of the mortgagees is made, because they are asking for the appointment of a receiver. The proviso says this: "Provided "that this sub-section shall not apply to any remedy or pro- "ceedings available in consequence of any default in the pay- "ment of a debt, or the performance of an obligation, being a "debt or obligation arising by virtue of a contract made after "the commencement of this Act." Accordingly, it seems that when sub-s. 4 refers to "the person liable . . . . to perform "the obligation in question" it means the person liable to perform the obligation, default in the performance of which has made the particular remedy which is sought available. In the present case who is the person who answers that description? It seems to me that there is one person and one person only, namely, the mortgagor. He is the only person who is liable to perform the obligation, and the fact that somebody else has undertaken, as between himself and the mortgagor,

C. A.
1942
LEICESTER TEMPERANCE AND GENERAL PERMANENT BUILDING SOCIETY'S APPLICATION, *In re.*
Lord Greene M.R.

to discharge the obligation does not make that somebody else a person who is in default in the performance of the obligation. The obligation which the mortgagees are seeking to enforce is an obligation to themselves, not an obligation to somebody else, and the only person who is under an obligation to themselves is the mortgagor. This was the view taken by Farwell J. in *In re The Woolwich Equitable Building Society* (1), and it seems to me that his judgment is unassailable in that regard. It has been said more than once, not merely with regard to this particular class of case but with regard to the other cases which I have mentioned, that there would appear to be a casus omissus in the Act. I must confess it strikes me in that way, too. What is being sought here is to exercise a remedy against property which belongs to the assignees, and the assignees are not in a position to protect that property and prevent the remedy being exercised by making a payment, owing, as they allege, to circumstances arising out of the war.

The case, therefore, is one which comes quite clearly within the mischief at which the Act was aimed. Nevertheless, the legislature has not used language, whatever its intention may have been, wide enough to extend the relief of the Act to such a case. It may very well be that the legislature will take into its consideration this and the other cases to which I have referred. But at present we are not here to legislate but to interpret and administer the Act as we find it; and, however much we may think that this is a case which ought to have been given the protection of the Act, we cannot extend that protection to it unless the language justifies it.

In the result, therefore, in my opinion the appeal must be dismissed.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *R. Raymond Pollard & Co.; Bracewell & Leaver.*

P. J. B.

---

(1) Ante p. 253.

C. A.
1942
May 13.

In re MORGAN.

MORGAN *v.* MORGAN.

Will—Gift—"All moneys of which I die possessed"—Rule of law—Word "money" in will must be construed in strict sense—Rule not suitable to modern conditions.

A testatrix directed that "all moneys of which I die possessed "of shall be shared by my nephews and nieces now living.":—

Held, affirming Farwell J., that the rule of law which lays down that the word "money" in a will shall be construed in its strict sense must be followed, and that the gift did not pass investments, household effects and freehold property. Rule unsuitable in view of the wide investing public in modern life.

APPEAL from Farwell J.

The testatrix, Emily Morgan, by her will, dated September 27, 1935, after making specific devises of certain cottages therein mentioned, directed that "all moneys of which I die "possessed of shall be shared by my nephews and nieces now "living, namely," and she named fourteen persons, one of whom was in fact her sister, and she appointed the plaintiff to be the executor of her will. The testatrix died on October 14, 1939. Her estate consisted of investments, cash at the bank, dividends received or accrued due, rents due prior to her death, a proportion of rents payable on property of which she was life tenant, some income tax repayments to which she was entitled, household goods, and some freehold properties, including those specifically devised. The plaintiff took out this summons asking whether the residuary estate passed to those named in the will or whether it passed as on an intestacy.

Farwell J. held that the word "moneys" must be construed in the strict sense, and that the gift to the nephews and nieces did not pass the investments, the household effects, or the freeholds not specifically devised, all of which passed as on an intestacy.

The legatees appealed.

Beebee for the legatees.
Hewins for the next-of-kin of the testatrix.
Danckwerts for the executor.

LORD GREENE M.R. This appeal raises in an acute form a question upon which a great deal has been said by way of criticism of the existing law with regard to the matter.

Farwell J. has held that the gift of "all moneys of which I "die possessed" covers, and covers only, the dividends received or accrued, cash at the bank, the rents due, the proportion of rents payable to her as life tenant, and the income tax repayment, and that the words do not cover either the investments, which are, of course, things which can be expressed in terms of money, or the freehold not specifically disposed of, or the household goods. He found himself bound by the rule which has now become so firmly established that this court, however anxious it might be, if it could, to alter it, is not, in my opinion, competent to do so. If the matter goes for the consideration of higher authority, it will, so far as my knowledge of the authorities goes, be perfectly open to the House of Lords to reconsider the whole matter. But so far as we are concerned, I have reluctantly come to the conclusion that we are bound to apply a rule of which it has been said more than once by judges, members of the profession and laymen, that it defeats the intention of the testatrix. Indeed, if I may add my own comment upon it, I think it is not too strong an expression to use to say that it is a blot upon our jurisprudence. The rule is, and it has been laid down on many occasions, that the word "money" in a will must be construed in what is called its strict sense, unless there is a context which permits of an extended meaning being given to it. The strict sense of "money", curiously enough—and this is one of the anomalies about this rule,—is a sense which has been invented by the courts, and invented, I think, partly in order to get rid of the rigours of the rule which would have existed if the word "money" had been confined to actual cash,—which, no doubt, was the original meaning. That was felt by the courts to be going too far, so they have invented a special category which they have called "money in the "strict sense," which includes money not in any strict sense, because it includes choses in action, such as moneys on drawing account at a bank. But that category is closed, and we cannot extend the language unless there is a context permitting such a course. In the present case I am afraid that I cannot find such a context. The case relied upon by Mr. Beebee, which he truly said was the high water mark of his argument, was the case of *In re Taylor* (1). I must confess, if I may say so with the greatest deference, that on reading that case I am still at a loss to understand exactly what the context was which enabled the court, happily in that case, to escape the consequences of the rule. Indeed, one of the vices of a rule such as this is that it induces a tendency, which is often very attractive to the judicial mind, to endeavour by some very subtle and sometimes over-subtle distinctions, to construe a will in such a way as to get out of the rule. I myself find any such process intellectually distasteful. But that is beside the point. Whatever may be said of *In re Taylor* (1) the context there was certainly not the same as the context here, and I cannot find anything in the context here which would justify me in saying that the general rule can be departed from. It seems to me that the later consideration of the rule in *In re Gates* (2), which was a case in this court, makes it clear that language such as we have here is not language which enables us to escape the rule. I therefore come to the conclusion, as I say, with great regret, that the rule is too strong for us, and that we must follow it and apply it in this case.

I would like to make this observation, however. This rule goes back to as early as the year 1725, as appears from the case of *In re Shelmer* (3), to which Luxmoore L.J. called my attention in the course of the argument. It may be that the rule was in operation earlier. But in those days social habits were very different from what they are now. Investments in the modern sense did not exist then, and the number of people who had money in the funds in those days was comparatively small. I should have been glad if it had been possible, let me say, when *In re Taylor* (1) was discussed in this court in the year 1923, for notice to have been taken of that circumstance. In the year 1923, the members of the investing public, in the modern sense, had grown enormously, and the habit of investment, largely due to savings in the last war, had penetrated to classes consisting of much humbler persons, with less money to spend on lawyers, in a way which had never happened before. That tendency has been increased many times by the present war, and I suppose it is no exaggeration to say that at the present time there are millions of persons, of comparatively humble position, who have put

(1) [1923] 1 Ch. 99.
(2) [1929] 2 Ch. 420.
(3) (1725) Gilb. 200, 202.

C. A.

1942

MORGAN, *In re.* MORGAN *v.* MORGAN.

Lord Greene M.R.

their savings into savings certificates, war bonds and so forth. Persons of that kind in ninety-nine cases out of a hundred, refer to those investments of theirs as their "money," and would so describe them if they attempted to dispose of them by a home-made will—as no doubt many of them will—with the result that they would succeed in dying intestate with regard to their savings. This I cannot but regard as a grave national misfortune. I cannot help thinking that in the year 1923 it would have been possible for the courts to have taken into consideration and given effect to the totally changed social conditions in the matter of investment which existed then as compared with the time, two hundred years ago, when this rule began to fasten itself upon the courts. In those days the harm which the rule could do was trifling compared with its effects to-day. However, I do not feel that we should be entitled to take that into account when I find that in the year 1929 this court obviously did not pay attention to any such matter. The rule was re-enunciated then, and I do not think this court would be justified in saying that in the year 1942 the rule no longer binds us.

In those circumstances, all I can do is to say that in my opinion we are compelled to dismiss this appeal.

LUXMOORE L.J. I agree with everything which has been said by the Master of the Rolls, and I share with him the regret that we are bound by authority to come to the conclusion that this appeal fails.

GODDARD L.J. So do I.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *C. R. Enever & Co.; Stocken, May, Sykes & Dearman; Park Nelson & Co., for G. B. Footner & Sons, Romsey.*

P. J. B.

Applied. *Re* Crosby's Contract.
[1949] 1 All E.R. 830.

COOK *v.* TAYLOR.

SIMONDS
J.

1942
May 14.

Emergency legislation—Vendor and purchaser—Specific performance—Contract for sale—Agreement in writing—Vacant possession—Property requisitioned by government—Vendor's inability to give vacant possession.

A vendor entered into a written agreement (which incorporated the Law Society's conditions of sale, 1934) with a purchaser for the sale to him of a freehold house. The agreement contained no reference to vacant possession, but particulars containing the statement " vacant possession on completion " had been delivered by the vendor's agents to the purchaser. Before the date fixed for completion the house was requisitioned by the government under reg. 51 (1.) of the Defence (General) Regulations, 1939 :—

Held, that the particulars were used in connection with the contract and were incorporated therein by the Law Society's conditions of sale and therefore there was a contract expressly to sell the property with vacant possession.

Held, also, that, apart from this, there was according to the general law an implication that the property was to be sold with vacant possession ; that, from the moment when the requisition notice was served on the vendor, he was not in a position to give vacant possession ; and that he was not entitled to specific performance of the contract.

In re Winslow Hall Estates Co. and United Glass Bottle Manufacturers, Ld.'s Contract [1941] Ch. 503 distinguished.

Witness Action.

By an agreement in writing dated February 4, 1941, the vendor agreed to sell to the purchaser freehold property known as No. 17 Grange Avenue, Reading, for 625*l.* The agreement provided that the sale should be completed on February 25, 1941, and the purchaser paid a deposit of 50*l.* The agreement, which incorporated the Law Society's conditions of sale, 1934, contained no reference to the property being delivered to the purchaser with vacant possession, but certain particulars of the property delivered by the vendor's agents to the purchaser included a statement "vacant possession on completion "of the purchase."

On February 19, 1941, the property was requisitioned and taken over by the town clerk of Reading under the Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 51 (1.), and the council was still in possession at the date fixed for completion. On March 1, 1941, the first set of occupants arrived at the premises. In these circumstances the vendor commenced an action against the purchaser, who had refused to complete, for specific performance of the contract.

Droop for the purchaser. The vendor contracted to give vacant possession and, being unable to do so, cannot enforce the contract. Where the sale is of a vacant house and the contract is silent as to possession, it is implied that vacant possession will be given (Williams on Vendor and Purchaser, 4th ed., p. 201, note (*e*)). Any occupancy is then an incumbrance.

Here, moreover, there was express agreement for vacant possession. The particulars supplied stated that there would be vacant possession on completion and they were used in connection with the contract within the Law Society's conditions of sale, 1934, and are part of the contract. By condition 5 (3.) it is provided: "(*a*) A purchaser paying his "purchase money, or, where a deposit is paid, the balance "thereof, shall (but subject to the execution of any conveyance "which ought to be executed by him), as from the date fixed "for completion, be let into possession or receipt of rents and "profits." Where there is no existing tenancy the words "or receipt of rents and profits" in that condition are otiose and the contract is to give possession: *Anker* v. *Franklin* (1); *Royal Bristol Permanent Building Society* v. *Bomash* (2).

Hewins for the vendor. A condition that vacant possession will be given only refers to incumbrances, such as leases by the vendor, and does not extend to any order under the Defence (General) Regulations, 1939. In this case no exclusive possession was given, the keys being merely handed over in case the town clerk wanted to use the property. Even if the contract provided for vacant possession (which is not admitted), the council was not in occupation until after the house was actually occupied on a date later than that fixed for completion. This case differs from *In re Winslow Hall Estates Co. and United Glass Bottle Manufacturers, Ld.'s Contract* (3), where, in spite of a requisition notice, the vendors were in a position to give vacant possession on the date fixed for completion. "Vacant possession" means "free from any lease or tenancy" in the ordinary sense. The property was, from the date of the contract, taken at the purchaser's risk,

(1) (1880) 43 L. T. 317.
(2) (1887) 35 Ch. D. 390.
(3) [1941] Ch. 503.

subject to occupation by the council. Even if preparations were made, something might have happened after the date fixed for completion to prevent the actual occupation from taking place. [He referred to Williams on Vendor and Purchaser, 4th ed., p. 545, and to *Lysaght* v. *Edwards* (1).] The vendor is entitled to specific performance, even if vacant possession cannot be given : see Fry on Specific Performance, 6th ed., p. 442, para. 941.

Droop in reply. " Vacant possession " means what it says. Possession was taken when the keys were handed over. In any event the vendor could not complete before the date on which the occupants came into occupation of the premises, as the time for delivery of requisitions had not then expired.

The vendor might have been able to plead impossibility of performance as a defence, if sued, but, having warranted a material term, cannot enforce the contract without fulfilling the warranty. [He referred to Williams on Vendor and Purchaser, 4th ed., pp. 977, 978.]

SIMONDS J. The first question which I have to determine is whether the contract was for vacant possession. The definition clause in the Law Society's conditions of sale, cl. 33, defines a contract as meaning any contract incorporating these conditions, including the "particulars," if any, used in connection with the contract. If that definition incorporates into the contract between the parties the particulars which were obtained by the defendant from the plaintiff's agent, then it is clear that the contract between the parties was expressly that vacant possession should be given. In regard to that it is said that this document of particulars was not used in connection with the contract, and it is quite true that it is not in any sense part of the written contract between the parties ; it was not referred to in the contract, and in that sense it was not part of the contract. I think, however, that it can fairly be said that it was used in connection with the contract. It was a document issued by the vendor for the purpose of informing an intending purchaser what were the particulars of the property which he was invited to buy and would form the subject-matter of any contract for sale. Therefore, on the particular facts of this case I hold that here there was expressly a contract to buy and sell with vacant possession.

---

(1) (1876) 2 Ch. D. 499.

The second point is this: apart altogether from that particular document, is there, according to the general law, here to be implied a contract of sale with vacant possession? I think the answer to that is in the affirmative. That is, I think, in accordance with the statement in Williams on Vendor and Purchaser, 4th ed., p. 201, where the learned author says: "So also, where land is expressly or impliedly sold "with vacant possession, a good title is not shown if it is "subject to any tenancy for years or less, which will not "expire before the day fixed or the proper time for completion," and in reference to that statement he cites a number of cases which appear to support the view that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion. I may add that that appears to me to be common sense, for it would be strange if, the vendor saying nothing about the matter which lay within his knowledge and not within the knowledge of the purchaser, the purchaser were to find himself purchasing a property subject to a tenancy of which he could know nothing. Therefore I hold that as a matter of law, on a contract of this character, there is the implied term that vacant possession shall be given on completion.

What, then, is the result of this incident? I will assume that the vendor was, apart from the question of possession, ready to complete on the day fixed for completion. It has been urged that although in the ordinary sense he was bound to give actual possession, that which took place was not a breach by the plaintiff of his obligation in that regard. In the first place it was said that the requisition notice and what took place before February 25, the date fixed for completion, did not preclude actual possession from being given. I do not take that view. It seems to me that, from the moment when the requisitioning authority served the notice and took the keys from the vendor, the vendor was not in a position to give vacant possession and was not in a position to allow the purchaser to enter on the property. It does not appear to me to be material whether it was before or after February 25 that occupation was actually taken by those persons who ultimately became the occupants.

On that part of the case I refer to the decision of Bennett J. in *In re Winslow Hall Estates Co. and United Glass*

Bottle Manufacturers, Ld.'s Contract (1), the facts of which were not very dissimilar but differ in one vital point. A contract for the sale of land had been entered into on December 23, 1940. Notice was given on behalf of the government, on January 25, 1941, to the purchasers that it was intended to requisition the land under reg. 51 (1.) of the Defence (General) Regulations, 1939. The vendors were in a position to complete on February 3, 1941. A summons was taken out on March 10, 1941, but on that date, according to the findings of the learned judge, the government had not taken possession of the land. In the report there is no reference to any taking possession of the land until occupation was taken by the persons concerned. The learned judge says this: "I am not going to decide what the position "of the parties would have been if possession had been taken "before the date fixed for completion or before the vendors "were in a position to complete, since it appears from the "evidence that on February 3, 1941, the vendors were in a "position to hand to the purchasers a properly executed "conveyance and to give them vacant possession of the "property which they had contracted to sell." The vital difference between that case and this, as it appears to me, is that here, as I hold, on the date fixed for completion the vendor was not in a position to do that which he had contracted to do and give vacant possession to the purchaser, for he had already, pursuant to a proper requisition, parted with the keys of the property, which is equivalent to symbolical delivery of the property to the requisitioning authority. From that moment he could not give vacant possession to the purchaser.

The second point which was taken on this part of the case was this: it is said that, even if the vendor was not in a position to give vacant possession at the date fixed for completion, that was an incident subject to which the purchaser took the property. It is said that, as from the date of the contract, the property became in equity the property of the purchaser and he took it subject to any misfortune such as flood, fire or requisition by the appropriate authority. I think the answer is that the two cases of flood or fire, on the one hand, and requisition by the appropriate authority on the other, are quite different matters. By this contract the vendor, as I have held, agreed to give vacant possession of the property on a particular day. That was his bargain, he must fulfil

---

(1) [1941] Ch. 503.

SIMONDS J.
1942
COOK v. TAYLOR.

it and cannot insist on the purchaser performing some bargain which he did not enter into. That is quite different from the case where there is no express bargain in relation to flood or fire, where the property is in equity the property of the purchaser, and where it may be that, through flood, or fire, the property is no longer in the position in which it was when the contract was entered into. Of that misfortune the purchaser must bear the brunt; it is otherwise where there is a term of the contract which the vendor is unable to fulfil.

The action fails and will be dismissed with costs and there will be a declaration on the purchaser's counterclaim for the repayment of his deposit, that he is entitled to the deposit.

Solicitors: *Gibson & Weldon, for Pitman & Bazett, Reading; Maude & Tunnicliffe, for Louch, Belcher & Co., Newbury.*

J. L. D.

C. A.
1942
May 15.

LANE *v.* MINISTER OF WAR TRANSPORT.

Emergency legislation—Transport—Hire of motor lorry by Minister—Subsequent requisitioning of lorry by Minister—Determination of contract of Hire—Defence (General) Regulations (St. R. & O., No. 1234), 1939, *reg.* 53—*Compensation (Defence) Act,* 1939 (2 & 3 *Geo.* 6, *c.* 75).

Reg. 53 of the Defence Regulations, 1939, provides ". . . . a "competent authority, if it appears to that authority to be "necessary or expedient to do so in the interests of . . . . the "efficient prosecution of war . . . . may requisition—(*a*) any "chattel in the United Kingdom."

In May, 1940, a county council, on behalf of the Minister of War Transport, hired a motor lorry from a haulage contractor for an undefined period, the council, under the written contract, reserving to itself the right to determine the contract at any time. In March, 1941, while the contract was still in force, the local transport commissioner gave a written notice on behalf of the Minister to the contractor requisitioning the lorry:—

Held, affirming Farwell J., that the notice to requisition put an end to the contract of hire, and was effective.

APPEAL from Farwell J. (1).

The plaintiff carried on business in Yorkshire as a haulage contractor, and in May, 1940, the North Riding county council,

---

(1) Ante p. 280.

C. A.
1942
LANE
v.
MINISTER
OF WAR
TRANSPORT.

on behalf of the Minister of War Transport, hired a motor lorry from him for a continuous but undefined period at the rate of 1*l.* a day. The contract was contained in a written order, whereby the council reserved the right to determine the contract at any time. In March, 1941, while the contract was still in force, the local transport commissioner, on behalf of the Minister, gave a written notice to the plaintiff requisitioning the lorry. The plaintiff then took out this summons claiming a declaration that the Minister of War Transport had no power to requisition and/or acquire the lorry when at all material times it was in the possession of and power of the Minister under the contract of hire. Farwell J. held that the notice of requisition put an end to the contract of notice, and was a good notice under reg. 53 of the Defence Regulations, 1939.

The plaintiff appealed.

G. R. F. Morris for the plaintiff.

Sir Donald Somervell A.-G. and *Danckwerts* for the defendant were not called on.

LORD GREENE M.R. This case in my opinion is too plain for argument, though Mr. Morris has done his best to make it attractive.

It was argued on behalf of the plaintiff that the requisition notice was incompetent, on the ground that the language of clause 2 of reg. 53 of the Defence (General) Regulations under the Compensation (Defence) Act, 1939, did not permit of a requisition notice in such circumstances as existed in this case. The argument in effect was that the Crown was already in possession of the vehicle, and did not require to use the requisitioning powers in order to get it, because they had already got it. I do not want to say anything which may affect other cases where the facts are different; but in the present case the answer seems to me to be clear; the service of the requisition notice was an effective termination of the contract of hiring. That was the view that Farwell J. took; and in my opinion he was right.

That being so, what is the position? When the contract of hiring is terminated, the lorry physically remains in the possession of the Crown. The Crown's sole duty at that moment of time is to hand the lorry back to the owner. The requisition notice, if it be valid, entitles the Crown to keep

C. A.

1942

LANE
v.
MINISTER
OF WAR
TRANSPORT.

Lord Greene
M.R.

the vehicle and make such use of it as it thinks fit. Mr. Morris did not feel it possible to argue that, before a valid requisition notice could be served, the Crown should hand the lorry back and immediately requisition it, so that at the moment of requisitioning it might be said that the lorry was in possession of the owner of the lorry. It seems to me that any argument to the contrary will not bear examination. If we consider the case as though the notice of termination of hiring was served ten minutes before the requisition notice, it is quite impossible to say that the requisition notice would have been bad, unless during the ten-minutes interval the vehicle was returned. The fact of the matter is that, on the termination of the hiring, the Crown would not have possession of or the right to deal with the vehicle in any way save by returning it to the owner. That being so, it seems to me that there was no substance in the complaint of the plaintiff of the conduct of the authorities in this case; and he has no ground in law for objecting to the requisition notice. Accordingly, the appeal must be dismissed with costs.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts; The Treasury Solicitor.*

P. J. B.

BENNETT
J.

1942

Mar. 30, 31;
May 18.

In re WESTWAYS GARAGE, LIMITED.

Company—Winding-up—Contributory—Liability—List of contributories and amount of liability finally settled—No power to reopen list—Supplemental list—Res judicata—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 5*—Companies* (*Winding-up*) *Rules,* 1929, *rr.* 78 *to* 83.

When a liquidator appointed by the court in the winding-up of a company has, after hearing arguments and objections, finally settled the list of contributories of the company and the amounts for which they are liable, his power under r. 83 of the Companies (Winding-up) Rules to vary or add to the list does not enable him or any succeeding liquidator to reopen any question which has been before him and which he has already decided, merely on the ground that an error may have been made in settling the list.

BENNETT J.

1942

WESTWAYS GARAGE, LD., *In re.*

MOTION.

Westways Garage, Ld. (hereinafter called " the company "), was incorporated in August, 1938, with a capital of 10,000*l.* divided into 10,000 shares of 1*l.* each, one of its promoters and its chairman at all times being John Stevenson McNish. At a meeting of the directors held on November 1, 1938, McNish being in the chair, it was resolved that certain shares should be allotted as fully paid, free in consideration of services fulfilled or to be fulfilled by the parties, namely, a block of 2000 shares (hereinafter called the "B" block) to McNish in consideration of his subscribing for 4000 fully paid shares, and for services rendered in promoting and arranging the finance of the company, and other "free" blocks to two other persons. It was also resolved that 6500 shares be issued against applications received, to be allotted for cash to be subscribed, the first allotment being to McNish for 4000 shares (which, less one share fully paid by McNish upon subscribing the memorandum, are hereinafter called the "A" block).

The company did not prosper, and on December 21, 1939, a directors' meeting was held at which McNish stated that war conditions prevented him from complying with the conditions in which the "B" block was to be freely allotted to him, and he returned his certificate for cancellation. The certificate was indorsed " Cancelled by arrangement with " Board of Directors in accordance with their minute of " directors' meeting held December 21, 1939 (Signed) " John S. McNish 22/12/39." On June 27, 1940, an order was made by Simonds J. for the compulsory winding-up of the company. In giving judgment, the learned judge said: " In the course of my experience I think I have never " seen such continued irregularity in regard to the capital " structure of a company . . . . . It is impossible from a " consideration of what has been done to arrive at any just " conclusion who is lawfully entitled to what shares and what " is the obligation of the said persons who are concerned. It " is only in my judgment by a winding-up order that the true " rights and positions of the parties can be ascertained."

On July 24, 1940, Albert Henry Partridge, chartered accountant, was appointed liquidator of the company. Under r. 79 he gave notice to McNish appointing September 26, 1940, as the day for settling the list of contributories, and proposing to include McNish as the holder of the "B" block

BENNETT J.
1942
WESTWAYS GARAGE, LD., *In re.*

of 2000 shares with nothing paid up thereon, and also as the holder of the "A" block of 3999 shares with 1000*l.* paid up at the commencement of the winding-up (1).

---

(1) Companies Act, 1929, s. 203, sub-s. 1: "As soon as may be "after making a winding-up "order, the court shall settle a "list of contributories, with power "to rectify the register of mem"bers in all cases where rectifica"tion is required in pursuance of "this Act, and shall cause the "assets of the company to be "collected, and applied in dis"charge of its liabilities: Provided "that, where it appears to the "court that it will not be "necessary to make calls on or "adjust the rights of contributor"ies, the court may dispense with "the settlement of a list of "contributories." Sub-s. 2: "In "settling the list of contributories, "the court shall distinguish "between persons who are con"tributories in their own right and "persons who are contributories "as being representatives of or "liable for the debts of others."

Section 220: "Provision may "be made by general rules for "enabling or requiring all or any "of the powers and duties con"ferred and imposed on the court "in England by this Act in respect "of the following matters—(2.) the "settling of lists of contributories "and the rectifying of the register "of members where required, and "the collecting and applying of "the assets . . . . to be exercised "or performed by the liquidator "as an officer of the court, and "subject to the control of the "court."

Companies (Winding-up) Rules, 1929. Rule 78: "Unless the court "shall dispense with the settle"ment of a list of contributories "the liquidator shall with all "convenient speed after his "appointment settle a list of con"tributories of the company, and "shall appoint a time and place "for that purpose. The list of "contributories shall contain a "statement of the address of, "and the number of shares or "extent of interest to be attri"buted to each contributory, and "the amount called up and the "amount paid up in respect of "such shares or interest and shall "distinguish the several classes "of contributories. As regards "representative contributories the "liquidator shall, so far as "practicable, observe the require"ments of s. 203, sub-s. 2, of "the Act."

Rule 79: "The liquidator shall "give notice in writing of the "time and place appointed for the "settlement of the list of contri"butories to every person whom "he proposes to include in the "list and shall state in the "notice to each person in what "character and for what number "of shares or interest he proposes "to include such person in the "list and what amount has been "called up and what amount "paid up in respect of such shares "or interest."

Rule 80: "On the day appointed "for settlement of the list of "contributories the liquidator "shall hear any person who objects "to being settled as a contribu"tory, and after such hearing "shall finally settle the list, which "when so settled shall be the "list of contributories of the "company."

Rule 81: "The liquidator shall "forthwith give notice to every

On October 11, 1940, the liquidator finally settled the list of contributories, making McNish a contributory in respect of the "A" block of 3999 shares with 1000*l.* paid up thereon, but decided that he ought not to be included in it in respect of the "B" block of 2000 shares. McNish did not accept this decision and he issued a summons in the winding-up, claiming that his name ought to be excluded altogether on the ground that he had made payments on behalf of the company which ought to be set off against his liability. The proceedings were compromised, and on March 18, 1941, a consent order was made under which the amount stated to be paid up on the "A" block of 3999 shares was increased to 1275*l.* Partridge died in April, 1941, and on June 17, 1941, his partner, Fincham, was appointed liquidator of the company. He at once pressed McNish to pay what was due from him on the "A" block of 3999 shares, and on his default recovered judgment against him for 2724*l.* and costs. McNish then applied for and obtained in the Brighton county court a protection order under the Liabilities (Wartime Adjustment) Act, and an order was made vesting his estate in Frederick John Partington Veale,

---

"person whom he has finally "placed on the list of contributories stating in what character "and for what number of shares "or interest he has been placed on "the list and what amount has "been called up and what amount "paid up in respect of such "shares or interest and in the "notice he shall inform such "person that any application for "the removal of his name from "the list, or for a variation of the "list, must be made to the court "by summons within 21 days "from the date of the service on "the contributory or alleged "contributory of notice of the "fact that his name is settled on "the list of contributories."

Rule 82: "(1.) Subject to the "power of the court to extend "the time or to allow an application to be made notwithstanding "the expiration of the time "limited for that purpose, no "application to the court by any "person who objects to the list of "contributories as finally settled "by the liquidator shall be entertained after the expiration of "21 days from the date of the "service on such person of notice "of the settlement of the list. "(2.) The Official Receiver shall "not in any case be personally "liable to pay any costs of or in "relation to an application to set "aside or vary his act or decision "settling the name of a person "on the list of contributories of a "company."

Rule 83: "The liquidator may "from time to time vary or add "to the list of contributories, but "any such variation or addition "shall be made in the same manner "in all respects as the settlement "of the original list."

the liabilities adjustment officer, who was the second applicant on this motion.

Fincham, having examined the case, came to the conclusion that Partridge had made a mistake in not including McNish as a contributory in respect of the "B" block of 2000 shares, and on December 15, 1941, he gave notice to McNish of an appointment for January 5, 1942, to settle a supplemental list of contributories, and to include McNish in that list in respect of the 2000 shares. Fincham purported to act under r. 83 of the Companies (Winding-up) Rules. McNish's solicitor attended this appointment and protested against the matter being reopened. On February 24, 1942, Fincham certified a supplemental list of contributories, placing the name of McNish thereon in respect of the "B" block, with a statement that nothing had been paid up thereon at the date of the commencement of the winding-up. McNish and Veale now moved for an order restraining Fincham and his successors as liquidators from acting in any way upon this supplemental list of contributories, and for an order cancelling the same, so far as it related to McNish, and taking it off the file; and in the alternative to vary it by excluding the name of McNish therefrom.

Salt for the applicants. Before any question of varying the supplemental list is reached, it is contended in limine that it is a nullity and the present liquidator ought to be restrained from acting upon it.

In the first place, the company and its successive liquidators and privies are estopped from seeking to make the applicant McNish in any way liable to contribute in respect of the "B" block. In his judgment on the winding-up, Simonds J. indicated that this might be an arguable point for the liquidator to decide. The first liquidator, with full knowledge of all the facts and after hearing McNish, unequivocally decided it in his favour. On the basis of and in reliance upon this decision McNish entered into a general compromise with the first liquidator and acceded to the registrar's order, whereby, by consent, the liability on the "A" block was fixed at an intermediate figure. Such order on the face of it related only to the "A" block but it recited an affidavit of McNish in which it was stated without contradiction that the first liquidator had desisted from any claim to establish liability upon the "B" block. The parties cannot be restored in integrum because the company by its second liquidator has since recovered judgment for the liability on the "A" block as so established.

In the second place, the question is res judicata, first because the consent order, having regard to its terms and the surrounding circumstances, really concluded the question of liability on both blocks, and secondly because on the true construction of the Companies (Winding-up) Rules, 1929, the second liquidator is bound by the quasi-judicial decision of the first liquidator. Rule 83 does not entitle a liquidator or his successor merely to reverse a former decision. The code contained in rr. 78 to 83 ought to be read (see r. 3) in conjunction with the statutory forms, and form 45 contemplates that a supplemental list made under r. 83 should be based upon new information coming to a liquidator's knowledge since the first list was settled. Here the first list gave effect to the first liquidator's decision that there was no liability on the "B" block and was deliberately confined to the question of liability on the "A" block. It was on the face of it, and having regard to r. 80, "final."

In the third place, the attempt of the second liquidator to go back on his predecessor's decision after the change in McNish's position and the lapse of over a year will not be allowed by the court whose officer he is. *Ex parte James* (1).

If the second liquidator was entitled to settle this supplemental list at all in respect of the "B" block, then it ought to be varied, because he was wrong and the first liquidator was right in his conclusion. The allotment "free" of the 2000 shares constituting the "B" block was ultra vires the company and void. McNish sought to surrender them and handed over the share certificate marked "cancelled" several months before the commencement of the liquidation. The company accepted this view and the liquidator can be in no better position than the company. Creditors have not been affected because no return of allotment ever referred to these shares, and all contributories knew the position.

Cecil Turner for the liquidator. I submit that there has been a mistake and the liquidator is entitled to correct it. McNish was and is on the register in respect of the "B" block, and he has not attempted to have it rectified. The company never accepted any surrender, and the Companies Act, 1929, makes McNish liable: *Welton* v. *Saffery* (2). The order previously made was not a compromise carried out by the

(1) (1874) L. R. 9 Ch. 609.

(2) [1897] A. C. 299.

sanction of the court, it was a consent order increasing the amount of the credit for payment on the shares held by McNish. The liquidator is bound to protect his creditors and, if he finds that a contributory ought to have been put on the list for a larger number of shares, to correct any mistake: see *In re James Pitkin & Co., Ld.* (1).

Salt in reply, referred to *In re London & Northern Insurance Corporation* (2); *In re Eddystone Marine Insurance Co.* (3).

Cur. adv. vult.

BENNETT J. It is clear on the evidence that Mr. Partridge, having given Mr. McNish notice that he proposed to include him in the list of contributories in respect of the "B" block of shares, after hearing objection on behalf of Mr. McNish, when he came finally to settle the list, decided that he ought not to be included in it in respect of the "B" block. There is no evidence as to the reasons which led Mr. Partridge to this decision, which, it seems to me, was plainly wrong. Mr. McNish had agreed to become a member of the company in respect of the shares. His name had been placed upon the register in respect of them. He had not paid for them. The statement of Mr. McNish recorded in the minute of the directors' meeting on December 21, 1939, that he was returning 2000 shares for cancellation was not effectual to determine the contract of membership with the company in relation to the 2000 shares into which he had entered, and the return by him to the company of the share certificate relating to the "B" block with the endorsement "Cancelled by arrangement with the "Board of Directors in accordance with their minute of "directors' meeting held at registered office December 21, "1939" is no more effectual than the minute. The minute records no arrangement made between Mr. McNish and the directors of the company, and Mr. McNish has nowhere sworn that any arrangement or agreement for cancellation of the allotment of the "B" block ever was made between himself on the one side and the company on the other.

The first two orders asked for by the notice of motion are asked for on the footing that the court will not inquire into the question whether or not Mr. Partridge was right or wrong in not putting Mr. McNish upon the list of contributories

(1) [1916] W. N. 112.
(2) (1869) L. R. 4 Ch. 682.
(3) [1893] 3 Ch. 9.

in respect of the "B" block. The submission was that Mr. Partridge rightly or wrongly decided that Mr. McNish ought not to be on the list, and having so decided, his successor, Mr. Fincham, cannot reopen the question, on the grounds that the company and its liquidator for the time being are estopped from purporting to reopen any such question, and that the matter is res judicata. The submission that Mr. Fincham was estopped from attempting to reopen his predecessor's decision was based upon the proceedings to vary Mr. Partridge's final list of contributories which terminated with the consent order of March 18, 1941. It was suggested that this order was a compromise order and Mr. McNish in para. 18 of his affidavit in support of this motion has sworn as follows: "I entered into this compromise and consented to the said "order and altered my position accordingly in reliance upon the "first liquidator's said decision and by way of final compromise "of all outstanding questions relating to both the "A" block "and the "B" block, and I have no reason to doubt that the "company and the first liquidator acted upon the same "footing and understanding." Having read the affidavits of Mr. McNish and Mr. Partridge stated in the order of March 18, 1941, I am clear that the decision of Mr. Partridge not to put Mr. McNish on to the list of contributories in respect of the "B" block of shares had nothing to do with the consent of Mr. McNish to that order, and in my judgment it does not estop Mr. Fincham from reopening the decision of his predecessor in office.

I think, however, that the applicants are entitled to succeed in this motion on the ground that the question which Mr. Fincham now seeks to raise is res judicata. The question, in my opinion, turns upon the language of the Companies (Winding-up) Rules, 1929, rr. 78 to 83. Mr. Fincham has no higher rights than Mr. Partridge had. Under the sections of the Companies Act which I have read, Mr. Partridge having given notice to Mr. McNish under r. 79 that he proposed to include him in the list of contributories in respect of "B" block, appointed a day to hear Mr. McNish's objections. He heard the objections and after hearing them, Mr. Partridge, as an officer of the court, was charged under r. 80 with the duty of finally settling the list of contributories. This duty Mr. Partridge performed, and the rule provides that when performed the list so settled, which is the outcome of the performance of the duty, shall be the list of contributories of the company. Mr. Partridge's duties were not purely administrative, they were in some respects judicial, and when they had been performed his duty was to produce a final result in respect of the objections he dealt with. Rule 80 indicates that when the liquidator has performed his duties finality is reached so far as he is concerned and as regards persons who object to the list of contributories as finally settled by the liquidator, r. 82 provides for finality to any objections from them.

Mr. Fincham's counsel relied upon r. 83 and argued that having regard to the language used in the rule there was no limitation of any kind upon the powers of a liquidator to vary or add to the list of contributories. Such an interpretation seems to me to give no meaning to the word " final " in r. 80 or in r. 81. Rule 83 ought, I think, to be read as one of a collection or group of rules each of which is connected with and related to the others in the group. Having regard to the provisions of rr. 80, 81 and 82, r. 83 ought not, in my judgment, to be read as a rule which enables a liquidator to reconsider an objection which has been considered and ruled upon either by himself or by his predecessor without assigning any reason for doing so other than that he or his predecessor in office has come to a wrong decision.

I do not intend to attempt to lay down any general principle. I decide on the facts of this case that Mr. Fincham is not entitled to reopen a question into which his predecessor, Mr. Partridge, inquired and upon which he came to a decision merely on the ground that Mr. Fincham thinks that Mr. Partridge's decision was wrong.

For these reasons I have come to the conclusion that the applicants are entitled to the relief they claim under heads one and two of the notice of motion.

I do not think there was any impropriety on the part of Mr. Fincham, or any conduct on his part, below the standard of conduct which the court looks for from its officer in attempting to reopen Mr. Partridge's decision. I would not have granted the applicants relief on that ground. If the question had been open and the applicants had had to argue that Mr. McNish never should have been put on the list of contributories in respect of the " B " block of shares, I should have been quite clear that they were wrong. Mr. Turner satisfied me that Mr. Partridge's decision was erroneous.

There will be a declaration that the supplemental list of contributories, certified by the liquidator on February 24, 1942, is invalid and ought not to be acted upon, and that it is ultra vires, with liberty to apply for an injunction.

Solicitors: *Windybank, Samuell & Lawrence; Fairchild Greig & Co.*

H. L. L.

COAL COMMISSION *v.* EARL FITZWILLIAM'S ROYALTIES COMPANY AND OTHERS.

BENNETT J.
1942
May 13, 14, 22.

Mine—Coal mine—Acquisition by Coal Commission—Rents and royalties—Apportionment—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 2—*Coal Act,* 1938 (1 & 2 *Geo.* 6, *c.* 52), *s.* 5, *sub-s.* 2 (*b*); *s.* 8 (*c*).

On July 1, 1942 (the vesting date under the Coal Act, 1938), there were to vest in the Coal Commission, by virtue of s. 5, sub-s. 2 (*b*), of the Act, interests of Earl Fitzwilliam's Royalties Company under an agreement for a lease made in 1933, whereby the company was entitled to a lease for 100 years of a certain seam of coal subject to the term created, and with the benefit of the rents reserved, by a lease dated May 3, 1904, to another lessee and a deed varying it dated December 9, 1930. There were to vest also in the Commission interests of four lessors under a lease dated September 18, 1935, and made between these lessors and a lessee. By virtue of the vesting the Commission was to become entitled to receive on September 29, 1942, half-yearly payments of "certain" rents from the lessees under the leases of May 3, 1904, and September 18, 1935, and, from the lessees under the lease of September 18, 1935, footage rent based on the quantity of coal worked since March 25, 1942; and also, on March 25, 1943, from the lessees under the lease of May 3, 1904, footage rent calculated on the quantity of coal gotten, and wayleave rent calculated on the quantity of coal carried, since March 25, 1942:—

Held, that, on the true construction of the Coal Act, 1938, as between the Commission and the company, the rents and royalties payable under the lease of May 3, 1904, and, as between the Commission and the four lessors, those payable under the lease of September 18, 1935, were apportionable under the Apportionment Act, 1870, on a time basis, which was the only basis on which they could legally be apportioned.

The Queen v. *Everist* (1847) 10 Q. B. 178, 193, and *Llewellyn* v. *Rous* (1866) L. R. 2 Eq. 27; 35 Beav. 591 applied.

ADJOURNED SUMMONS.

The question raised by this summons was whether the

BENNETT J.

1942

COAL COMMISSION v. EARL FITZWILLIAM'S ROYALTIES CO.

Apportionment Act, 1870 (1), applied to the contracts assumed to have been made by the plaintiffs, the Coal Commission, as purchasers, and the defendant company and the personal defendants respectively, as vendors, under which, on July 1, 1942, there would by virtue of the Coal Act, 1938 (2), vest in the Coal Commission certain interests in coal and mines of coal at the date of this summons vested in the respective vendors.

---

(1) By s. 2 of the Apportionment Act, 1870: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income . . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

(2) By s. 1, sub-s. 1: "There shall be a Coal Commission (in this Act called 'the Commission') to exercise and perform the powers and duties set out in this Act."

By sub-s. 2: "The Commission shall be a body corporate by the name of 'the Coal Commission,' with perpetual succession and a common seal, and with power to hold land without licence in mortmain."

By s. 3, sub-s. 1: "The Commission shall acquire in accordance with the provisions of this Part of this Act the fee simple in all coal and mines of coal, together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned, and subject to the provisions of this Part of this Act with respect to the retention of interests arising under coal-mining leases and of certain other interests."

By sub-s. 2: "During the period between the first day of January, 1939 (in this Act referred to as the 'valuation date') and the first day of July, 1942 (in this Act referred to as the 'vesting date') all coal and mines of coal shall be held as if all the existing owners thereof had, in respect of all their interests therein other than retained interests and with full capacity so to do, entered into a contract on the valuation date for the sale thereof to the Commission, at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date."

By sub-s. 3: "On the vesting date all coal and mines of coal as existing at that date shall vest in the Commission for a title comprising all interests then subsisting in any such coal or mine other than retained interests."

By s. 5, sub-s. 1: "Except as provided by sub-s. 2 of this section, interests in coal or a mine of coal that arise under a coal-mining lease shall be retained interests."

By sub-s. 2: "The following interests, that is to say . . . . (*b*) interests arising under a coal-mining lease where neither the lessee nor any person claiming under him is a person carrying on the business of coal-mining and having a substantial beneficial interest in the exercise of the rights conferred by the

The defendant company was entitled in equity under an agreement for a lease made on April 19, 1933, between Earl Fitzwilliam and the defendant company to a lease from Earl Fitzwilliam for a term of 100 years from April 19, 1933, of the Parkgate bed of coal lying under certain lands in the county of York as described in an indenture of lease dated May 3, 1904, and a varying deed dated December 9, 1930, both documents being made between Earl Fitzwilliam as lessor of the one part, and John Brown & Co., Ld., as lessees of the other part. The leasehold interest of the defendant company in this bed of coal was subject to the term created and with the benefit of the rents reserved by the said indenture of lease of May 3, 1904, and the varying deed of December 9, 1930. By these instruments the Parkgate bed of coal under the said lands was vested in John Brown & Co., Ld., as lessees for a term expiring on March 25, 1970, and John Brown & Co., Ld., had the right to work, get, carry away and dispose of the demised coal, and also the right during the term to work, get, carry away and dispose of any coal which they were or should from time to time be entitled to work during the term. The terms of the lease providing for the payment of rents by John Brown & Co., Ld., were: "Yielding and "paying by equal half-yearly payments on the 25th day of "March and the 29th day of September in respect of such of "the premises hereinbefore described as the lessor has power "to demise during the first year of the said term the certain "yearly rent of 500*l.* during the second year of the said term

---

"lease; shall not be retained "interests unless the Commission "so direct."

By s. 8: "The rules of law and "equity that regulate rights and "obligations in relation to land "that is the subject of a contract "for sale in respect of the period "between the date of the contract "and the date fixed for completion "thereof shall have effect in "relation to the premises that are "to vest in the Commission by "virtue of this Part of this Act "in respect of the interim period, "subject to and in accordance "with the following provisions, "that is to say:— . . . . (*c*) the "contract for sale to be assumed "for the purposes of the said "rules shall be a contract providing expressly that the vendor "should be entitled to the "possession and enjoyment of the "property until the date fixed "for completion and to the benefit "of the rents and profits thereof "accruing up to that date, and "that rents and profits accruing, "or coal worked, before that date "from a mine of coal that is "opened after the date of the "contract should be treated in "like manner as if the mine had "been open at the date thereof."

"the certain yearly rent of 1000*l.* and during the third and "every succeeding year of the said term the certain yearly "rent of 2000*l.* such certain rents to be for and in respect of "such quantity of the said bed of coal hereby demised as at "the rates next hereinafter mentioned shall be equivalent to "the amount of such certain rents which shall be paid whether "any coal shall have been gotten or not the first payment to "be considered to have become due and payable on the 29th "day of September 1891 And also yielding and paying on "the 25th day of March in every year the rent of 37*l.* 10*s.* "per foot thick for every acre of the said bed of coal hereby "demised under the lands shown by the colours pink and yellow "and pink barred red and pink barred blue and pink barred "yellow on the said plans if such bed shall be found to be of the "thickness of 48 inches or more or 35*l.* per foot per acre if "such bed shall be found to be of a less thickness than 48 inches "and the further rent of 20*l.* per foot thick for every acre of "the said bed of coal hereby demised under the lands shown "by the colours green and brown and green barred green on "the said plan and so in proportion for fractional parts of an "acre of the coal hereby demised which during the preceding "year shall have been gotten out of the said lands over and "above the quantities which the lessees are authorized to "work and get in respect of the said respective certain rents . . . . "And also yielding and paying on the 25th day of March in "every year the rent of 10*l.* for every acre of coal not belonging "to the lessor which shall be brought or carried by the lessees "through any of the mines or coal situate under the said lands "except the land shown by the colour pink barred blue on the "said plan." The Commission therefore would in due course become entitled to be paid by the lessees, John Brown & Co., Ld., whose interests under the said lease and deed of variation would be retained interests under s. 5 of the Act, first, on September 29, 1942, 1000*l.*, the half-yearly payment of the certain rent; secondly, on March 25, 1943, the footage rent (if any) calculated upon the quantity of the demised coal gotten since March 25, 1942; thirdly, on March 25, 1943, the wayleave rent calculated on the quantity of foreign coal carried since March 25, 1942.

The personal defendants were the owners of certain seams of coal in Yorkshire described in and demised by an indenture of lease of September 18, 1935, and made between them as lessors and the Carlton Main Colliery Co., Ld. By that lease the seams of coal therein described were demised to the Carlton Main Colliery Co., Ld., with liberty to work, get, convert, carry away and dispose of the demised coal for a term of 60 years from March 25, 1924. By clause 9 of the lease it was provided: "The following rents and payment shall be "made by the lessees by equal half-yearly payments on the "25th day of March and the 29th day of September in every "year of the said term the first payment thereof to be deemed "to have become due and payable on the 29th day of September "1924. (1.) For the first year of the term the certain rent of "100*l.* for the second year of the term the certain rent of 150*l.* "and for the third and each subsequent year of the term the "certain rent of 200*l.* such certain rent to be as for and in "respect of such quantities of the said seams of coal hereby "demised whether such coal shall be worked or not as at the "rates hereinafter reserved shall be equivalent to the amount "of the said certain rent. (2.) 26*l.* per foot thick per statute "acre of the Parkgate Seam and 20*l.* per foot thick per statute "acre of all other seams which during the preceding half year "shall be worked out of any of the lands under which the "seams are hereby demised over and above the quantity "which at the respective rates aforesaid shall be equivalent "to the said certain rent payable for such half year. . . . ."

The Commission accordingly would become entitled to receive from the Carlton Main Colliery Co., Ld., whose interests also would be retained interests under s. 5 of the Coal Act, 1938, on September 29, 1942, first, the 100*l.*, being half the yearly payment of the certain rent of 200*l.*, and, secondly, on the same date, the footage rent based on the quantity of coal worked since March 25, 1942.

The summons asked whether, on the true construction of s. 8 (*c*) of the Coal Act, 1938, the Apportionment Act, 1870, did or did not apply in ascertaining the rents, royalties and other payments payable up to the vesting date to the defendant company and the personal defendants under their leases and, if it did, whether the apportionment ought to be on a time basis or based on the amount of coal worked (or, in the case of the wayleave rent, carried) up to the vesting date.

Wilfrid Hunt for the Commission. The Apportionment Act, 1870, applies to the rents and royalties in the present case because they are payable on periodic dates. The argument that it does not apply is negatived by the words "the rents "and royalties accruing up to that date" in s. 8 (*c*) of the Coal Act, 1938, because the word "accruing" suggests that some apportionment must be made on the vesting date. Sect. 8 (*c*) necessarily involves apportionment. It provides for a hypothetical contract between the Commission and the royalty owner with a term that until the date fixed for completion the rents and profits are to belong to the royalty owner. It is true that in *St. Aubyn* v. *St. Aubyn* (1) the court held that the Apportionment Act, 1834, did not apply because the royalties were not reserved for any fixed dates. In *Llewellyn* v. *Rous* (2), however, Lord Romilly M.R. held that the executors of a deceased tenant for life were entitled to an apportioned part of royalties, but did not show how the apportionment was to be carried out. He disregarded *St. Aubyn* v. *St. Aubyn* (1), treating it as a decision that there ought to be no apportionment of uncertain royalties. In *In re Griffith* (3) it was held that a bonus or surplus profits paid by an insurance company every five years was apportionable, although it was pointed out to the court that in all probability very much more of the bonus was earned in one part of the period than in another. In MacSwinney on Mines, 5th ed., p. 159, para. 558, the view is taken that the effect of the decisions is that the Apportionment Act, 1870, applies to royalties as well as to minimum rent. Nothing is said, however, about the method of apportionment, and *St. Aubyn* v. *St. Aubyn* (1) is distinguished on the ground that it was concerned with royalties payable at uncertain times. [He referred to s. 117, sub-s. 1 (xxii.), of the Settled Land Act, 1925 (4).] Thus, the effect of the authorities clearly is that the Apportionment Act, 1870, applies to royalties payable at fixed periods.

The apportionment should be based on time, first, because the Apportionment Act, 1870, itself so provides, secondly, because neither *Llewellyn* v. *Rous* (2) nor MacSwinney on Mines suggests that it should be based on anything else, and thirdly, because the minimum rent clearly must be apportionable solely on time. Also the royalties in the result are simply money rents. There is a formula setting out how that money rent is to be ascertained for each particular period and, in order to ascertain the rent and apply the formula, a special survey has to be made.

---

(1) (1861) 1 Dr. & Sm. 611.

(2) (1866) L. R. 2 Eq. 27; 35 Beav. 591.

(3) (1879) 12 Ch. D. 655.

(4) By s. 117, sub-s. 1: "In "this Act, unless the context "otherwise requires, the following "expressions have the meanings "hereby assigned to them respec- "tively, that is to say: . . . . "'Rent' includes . . . . royalty, "or other reservation, by the "acre, or the ton, or otherwise; ". . . ."

J. B. Herbert for the defendants. The Apportionment Act, 1870, does not apply. It is excluded by s. 8 (*c*) of the Coal Act, 1938, which provides for a statutory contract of sale between a landlord and tenant containing an express provision for an apportionment and shows quite clearly the terms of that apportionment. [He referred to Halsbury's Laws of England, 2nd ed., vol. xiii., p. 34, para. 31.] The only meaning properly attributable to the words "rents and profits accruing "up to that date" in s. 8 (*c*) is such sums as can fairly be estimated to give to the owner of the rents and royalties the share of profits to which he is entitled for that period. It is true that the implied term proper to be read into the statutory contract with regard to the certain rent is that it shall be assumed to have accrued day by day at a constant rate, i.e., precisely the same form of apportionment applies to it as would have applied to it under the Apportionment Act, 1870.

Even, however, if s. 8 (*c*) of the Coal Act, 1938, does not exclude the Apportionment Act, 1870, the legislature must be taken to have passed the Coal Act, 1938, with knowledge of the practice with regard to mining leases and with knowledge of the ordinary arrangements between lessor and lessee whereby the amount of footage rent and wayleave rent, subject to the payment of a certain or minimum rent, is calculated not by time, but by the amount of coal worked or carried. Therefore, if the Apportionment Act, 1870, applies, it does not necessarily follow that footage rent and wayleave rent fixed with regard to the amount of coal worked or carried is to be apportioned on a time basis. The footage rent should be apportioned by finding out, on the vesting day, how much coal was got and how thick it was, and giving to the lessors the sums to which they are found to be entitled on the vesting day. Likewise, the wayleave rent is properly apportionable by paying to the defendant company the wayleave rent on the coal carried by the lessee under the lease of May 3, 1904, from March 25, 1942, to the vesting date. The parties to the statutory contract are not to be taken to have agreed that the footage rent and wayleave rent should be deemed to accrue at a constant rate from day to day. In *Llewellyn* v. *Rous* (1) Lord Romilly M.R. held that royalties under a mining lease were apportionable,

(1) L. R. 2 Eq. 27; 35 Beav. 591.

but did not say how they were to be apportioned. The Apportionment Act, 1870, provides only that payments of this kind shall be deemed to accrue from day to day. That may mean at a constant rate from day to day, or at different rates on different days. It is true, however, that in *In re Griffith* (1) Sir George Jessell M.R. took the view that, in cases of the kind before him, the payment of a bonus should be treated as the payment of interest on money, and be considered as accruing from day to day. In face of that decision, the only submission that can be made on behalf of the defendants is that the present case is quite anomalous and quite distinct in principle from the ordinary case of interest on money lent, and that therefore there is no authority binding the court to hold that the footage and wayleave rents accrue at a constant rate from day to day although in fact they do not.

[BENNETT J. Lord Romilly M.R., in *Llewellyn* v. *Rous* (2), held that royalties under a mining lease were apportionable as between tenant for life and remaindermen under the Apportionment Act, 1834. I will send over to the Record Office for the actual order which he made.]

Hunt in reply.

[BENNETT J. It is curious that Lord Romilly M.R. is reported, at any rate in Beavan (3), as saying "On that I "express no opinion," i.e., on the application of the Act in a case where the payment depends on the quantity of ore raised, and yet he declared an apportionment. Perhaps the Bill and the decree from the Record Office will make it quite clear that his decision is an authority in favour of the Coal Commission in the present case.]

Cur. adv. vult.

1942. May 22. BENNETT J. delivered the following written judgment. In my judgment, all the rents, that is to say, the certain rents, the footage rents, and the wayleave rent, are apportionable on the basis of time and not otherwise under the Apportionment Act, 1870, and for these reasons. It is to be noted that under the assumed contracts between the parties to the present summons the property which will be vested in the Commission on July 1 next will not be coal of which the vendors will then be in possession. The vendors respectively

(1) 12 Ch. D. 655, 665.
(2) L. R. 2 Eq. 27; 35 Beav. 591.
(3) 35 Beav. 593.

will have only reversionary interests in coal or mines of coal. In the case of the defendant company the coal will be in the possession of John Brown & Co., Ld., and in the case of the personal defendants the coal will be in the possession of the Carlton Main Colliery Co., Ld. What will vest in the Commission will be the reversionary interests of the vendors in certain coal or mines of coal subject to and with the benefit of the leases to John Brown & Co., Ld., and the Carlton Main Colliery Co., Ld. It is to notional contracts for the sale of this kind of property that the provisions of s. 8 (*c*) of the Coal Act, 1938, have to be applied. In the case of property of this kind the assumed contract provides that the vendor is to be entitled to the benefit of the rents and profits thereof accruing up to the date fixed for completion; that is July 1, 1942. Paragraph (*c*) must, as it seems to me, have been framed upon the footing that the Apportionment Act, 1870, applied, for rents and profits do not accrue from day to day by the common law, and there is no express provision in the Coal Act, 1938, that they shall be considered for the purpose of that Act, so to accrue. Therefore it seems to me that the framers of the section in question must have had the Apportionment Act, 1870, in mind when they enacted that the assumed contract is expressly to provide that the vendor shall be entitled to the benefit of the rents and profits of the property accruing up to the date fixed for completion.

The first question is whether the certain rents, the footage rents, and the wayleave rent, with which this application is concerned, are rents or other periodical payments in the nature of income within the meaning of s. 2 of the Apportionment Act, 1870. In my judgment, there can be no question but that the certain rents, the one payable by John Brown & Co., Ld., and the other by the Carlton Main Colliery Co., Ld., are rents within the section. There is a foothold for an argument that the footage rent and the wayleave rent are outside the section, since they vary in amount and depend in the one case on the quantity of coal gotten, and in the other case on coal carried, and so may vary from day to day. I do not myself think that this fact would be a good reason for concluding that they are not rents. It might be a matter to be taken into consideration in deciding a different question, namely, whether, if they are to be apportioned, it would be fair to apportion them on a time basis; but it is not necessary for me to consider the point because, in my judgment, it is settled by authority. In

BENNETT J.

1942

COAL COMMISSION v. EARL FITZWILLIAM'S ROYALTIES CO.

The Queen v. *Everist* (1) it was decided by the Court of Queen's Bench that a royalty is a true rent and in *Llewellyn* v. *Rous* (2) Lord Romilly M.R. decided that royalties reserved by mining leases were rents within the meaning of the Apportionment Act, 1834, and so apportionable as between a tenant for life and remaindermen. On the language of the Apportionment Act, 1870, and with the aid of these authorities, I have come to the conclusion that the footage rents, and the wayleave rent are, like the certain rents, rents within the meaning of the Apportionment Act, 1870.

The next question is how they ought to be apportioned. Are the several sums which fall to be paid on the respective term days to be considered as having accrued from day to day and be apportionable in respect of time, or ought they to be apportioned on some other basis? As regards the certain rents there is, in my judgment, no other basis on which these can be apportioned. As regards the footage rents and the wayleave rent, it was argued that these ought to be apportioned by ascertaining in respect of the former the quantity of coal gotten and its thickness on the vesting day, and calculating the sum to which the respective vendors were entitled on that day, and deciding that the vendors were entitled to be paid by the Commission a sum so ascertained. As regards the wayleave rent the same argument was advanced. It was said that the quantity of foreign coal carried by John Brown & Co., Ld., from March 25 to the vesting date should be ascertained, and the wayleave rent on that quantity calculated and paid to the defendant company. Such a method of apportionment is not provided for by the Apportionment Act, 1870, nor is it provided for by the Coal Act, 1938.

It was suggested that the language which Lord Romilly M.R. is reported to have used in *Llewellyn* v. *Rous* (1), as the report of his judgment appears in Beavan, left open the question whether the apportionment which he ordered in that case was to be made on the basis of time or on some other basis. At the request of the parties, since the hearing, I have looked at the original bill and the decree in *Llewellyn* v. *Rous* (1) preserved at the Record Office. The question of the apportionment of the rents reserved by the mining leases was a minor point in the suit which was mainly concerned with the priority of certain charges. The allegation in the bill in regard to the mineral leases was contained in para. 57 of the bill, which

(1) 10 Q. B. 178, 193.

(1) L. R. 2 Eq. 27; 35 Beav. 591.

was as follows: "A question has also arisen whether the "estate of the said Capel Hanbury Leigh is entitled to an "apportioned part of the royalties payable upon certain mining "leases granted by the said Capel Hanbury Leigh in pursuance "of a power in that behalf contained in the said indenture of "settlement of April 12, 1797, of certain portions of the estate "herein comprised. One of such leases is dated May 25, 1837, "and one half-year's payment of royalties accrued due under "such lease on November 25, 1861. Another of such leases "is dated May 5, 1838, and a quarterly payment of royalties "accrued due thereunder on November 29, 1861. The third "of such leases is dated November 24, 1846, and a quarterly "payment of royalties accrued due thereunder on September 29, "1861. The fourth of such leases is dated March 18, 1861, and "a half-yearly payment of royalties accrued due thereunder "on September 29, 1861." These are the only allegations in the bill relating to the mining leases. The relevant parts of the decree are as follows: "His Lordship doth declare that the "half-yearly payment of royalties which accrued due on "November 25, 1861, under the lease of May 25, 1837, and the "quarterly payment of royalties which accrued due on "November 29, 1861, under the lease of May 5, 1838, and the "quarterly payment of royalties accrued due on September 29, "1861, under the lease of November 24, 1846, and the half-"yearly payment of royalties which accrued due on Septem-"ber 29, 1861, under the lease of March 18, 1861, as well as "all other royalties or rents if any reserved by any lease "granted in pursuance of the power of the indenture of "April 12, 1797, in the bill mentioned by Capel Hanbury "Leigh and Dame Molly Ann Hanbury Leigh or either of them "since the 19th day of June, 1834, are apportionable between "the estate of Capel Hanbury Leigh and the persons entitled "to the residue of the premises comprised in such leases "respectively in remainder expectant on the decease of the "said Capel Hanbury Leigh and it is ordered that the following "inquiries and accounts be made and taken, namely, (1.) An "inquiry by whom such royalties or rents have been received. "(2.) And if such royalties or rents have been received by any "party or parties to this cause an account of such royalties "or rents received by such party or parties or by any other "person or persons by his or their order or for his or their use. "(3.) And it is ordered that such rents be apportioned having "regard to the declaration hereinbefore contained."

I will now read s. 2 of the Apportionment Act, 1834: ". . . . From and after the passing of this Act all Rents "Service reserved on any lease by a tenant in fee or for any life "interest, or by any lease granted under any power (and which "leases shall have been granted after the passing of this Act), "and all rents charge and other rents, annuities, pensions, "dividends, moduses, compositions, and all other payments of "every description, in the United Kingdom of Great Britain "and Ireland, made payable or coming due at fixed periods "under any instrument that shall be executed after the passing "of this Act, or (being a will or testamentary instrument) that "shall come into operation after the passing of this Act, shall be "apportioned so and in such manner that on the death of any "person interested in any such rents, annuities, pensions, "dividends, moduses, compositions, or other payments as "aforesaid, or in the estate, fund, office, or benefice from or in "respect of which the same shall be issuing or derived, or on "the determination by any other means whatsoever of the "interest of any such person, he or she, and his or her "executors, administrators, or assigns, shall be entitled to a "proportion of such rents, annuities, pensions, dividends, "moduses, compositions, and other payments according to "the time which shall have elapsed from the commencement "or last period of payment thereof respectively (as the case "may be), including the day of the death of such person, or "of the determination of his or her interest . . . ."

Having read the section it is, in my judgment, clear that Lord Romilly's declaration and the account he ordered were framed upon the footing that the royalties were to be apportioned on the basis of time. No other basis is possible. When the facts in *Llewellyn* v. *Rous* (1) are examined, the difficulty which had to be solved in the case is clear and was in no way concerned with whether a royalty was a rent within the meaning of the Act or how the apportionment was to be made. The mineral leases in question had been granted by Mr. Capel Hanbury Leigh in exercise of a power given to him as tenant for life under a settlement made on April 12, 1787. Note the date. It was before the Apportionment Act, 1834. The leases made in exercise of the power were all made after 1834. Now observe the language of the second branch of s. 2 of the Apportionment Act, 1834: "All rents charge and other rents, "annuities, pensions," and so forth, "made payable or coming

(1) L. R. 2 Eq. 27; 35 Beav. 591.

BENNETT J.

1942

COAL COMMISSION v. EARL FITZ-WILLIAM'S ROYALTIES CO.

"due at fixed periods under any instrument that shall be "executed after the passing of this Act," and so forth. The argument advanced for the remaindermen in *Llewellyn* v. *Rous* (1) was that the Act of 1834 did not apply to leases granted under a power in an instrument made before 1834. The suggestion advanced in argument was that it was difficult to decide otherwise having regard to the decision in *St. Aubyn* v. *St. Aubyn* (2). In the light of these facts it is plain that the point upon which, as appears from the report of his judgment, Lord Romilly M.R. was declining to express an opinion was not as to the method of apportioning royalties, but was as to the difficulty to which the decision in *St. Aubyn* v. *St. Aubyn* (2) was said to give rise in coming to a conclusion that the Apportionment Act, 1834, applied to a case in which a lease was granted in exercise of a power contained in an instrument made before 1834.

In my judgment, as a matter of construction of the Coal Act, 1938, the Apportionment Act, 1870, applies not only to the certain rent, but also the footage rent, and the wayleave rent payable under the lease of May 3, 1904, and to the certain rent and the footage rent payable under the lease of September 18, 1933. These rents, in my judgment, are apportionable on a time basis only, for there is no other legal basis upon which they can be apportioned, and I will so declare.

Solicitor for the Commission: *B. S. Jaquet.*

Solicitors for all the defendants: *Warren, Murton Foster & Swan, for Newman & Bond, Barnsley.*

(1) L. R. 2 Eq. 27; 35 Beav. 591. (2) 1 Dr. & Sm. 611.

K. R. A. H.

BENNETT J.

1942

May 6, 7, 22.

In re LINDOP.

LEE-BARBER *v.* REYNOLDS.

Administration—Survivorship—Will of husband in favour of wife—Deaths of husband and wife in air raid—Evidence of instant death by blast—Statutory presumption—Wife as younger deemed to be survivor—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.

A husband and wife who were living in the same house, and slept in the same room, were killed in an enemy air raid. The house was struck by an explosive bomb and demolished, and the bodies were found on the ground floor underneath their bedroom suffering

BENNETT J.

1942

Lindop, *In re.*

Lee-Barber *v.* Reynolds.

from multiple injuries. The evidence showed that they must both have been instantly killed by the blast of the explosion, and the two witnesses who found and examined the bodies expressed the opinion that the deaths must have been simultaneous. The husband who had made his will in favour of his wife was the elder:—

Held, that it was impossible to say, on the evidence, that both husband and wife died at exactly the same moment of time, and therefore the statutory presumption created by s. 184 of the Law of Property Act, 1925, was not rebutted, and the wife as the younger must be deemed to have survived her husband.

The section creates a rebuttable presumption, but it does not give the court any discretion to disregard it if the court came to the conclusion that it would be unfair or unjust to act upon it.

Summons.

The facts were stated by the learned judge substantially as follows.

This summons was issued for the purpose of obtaining the decision of the court as to the destination of the residuary estate of the late Kenneth Lindop, who died on May 19, 1941, as the result of an air raid at Torquay. His wife died on the same day and as a result of the same air raid. The answer to the question depended upon whether Mrs. Lindop survived her husband.

At the time of their deaths Mr. and Mrs. Lindop were living together in a villa in Parkhill Road, Torquay, known as "Blue Hayes." They occupied the same bedroom on the first floor of "Blue Hayes," each having a separate bed and their beds being placed side by side. Mr. Lindop was born on January 19, 1885; Mrs. Lindop was born on December 4, 1894. Mr. Lindop made his will on December 7, 1928. Of that will the plaintiff was the sole executor. He made some small specific and pecuniary bequests and, subject to payment of his funeral and testamentary expenses and debts, he gave, devised and bequeathed all the residue of his estate and effects to his wife absolutely. Mrs. Lindop made a will on February 3, 1931. Of that will her brothers, the first two defendants, were the executors. By her will she bequeathed some legacies, including one of 200*l.* to her husband, and subject thereto she gave the residue of her estate to her executors upon trust for sale and to pay the net proceeds to her mother. In the event of her mother predeceasing her she gave 200*l.* to each of her sisters and the residue was to be divided between her brothers and sisters in equal shares.

The dead bodies of Mr. and Mrs. Lindop were both found in the ruins of their house on the morning of May 19, 1941. Nobody saw either of them die. They died in the following circumstances. It is supposed that on the night of May 18, 1941, they both went to bed and to sleep in their respective beds in their bedroom at "Blue Hayes." On the morning of May 19, 1941, an enemy aeroplane was over Torquay. It was seen about 5.30 A.M. by a Mr. Quick, a carpenter employed by the Borough of Torquay and the leader of a rescue squad formed to work in the borough. The aeroplane was then flying across Torquay from north to south in the direction of "Blue Hayes." Mr. Quick, who was watching, saw the flash of two bombs as they exploded and shortly afterwards he went with his squad to "Blue Hayes" and there he saw lying close together the dead bodies of Mr. and Mrs. Lindop. He arrived at "Blue Hayes" at about 5.50 A.M. The bodies had not then been moved. "Blue Hayes," which was a detached modern villa, was completely destroyed and so were its contents. The dead bodies of Mr. and Mrs. Lindop were on the floor of what had been a sitting room immediately below their bedroom. The bodies were in night clothes and these were in rags. Near the bodies were the remains of two single beds and two separate spring mattresses.

A. C. Nesbitt for the plaintiff, the husband's executor.

Mulligan for the first two defendants, executors of Mrs. Lindop. The evidence of the two witnesses who have sworn affidavits that Mr. and Mrs. Lindop were both killed at the same instant of time is given as their opinion; they cannot prove this as a matter of fact. It is practically impossible for this to have happened, and so one must have survived the other, even if only for a moment. Therefore it is uncertain which of the two lived the longer, and s. 184 of the Law of Property Act (1) applies, and the presumption is that the wife was the survivor. The section was passed in order to establish a statutory presumption in such a case as this, and to get rid of the difficulties caused by the decision in *Wing* v. *Angrave* (2),

---

(1) By the Law of Property Act, 1925, s. 184: "In all cases "where, after the commencement "of this Act, two or more persons "have died in circumstances ren-"dering it uncertain which of "them survived the other or "others, such deaths shall (sub-"ject to any order of the court), "for all purposes affecting the "title to property, be presumed "to have occurred in order of "seniority, and accordingly the "younger shall be deemed to "have survived the elder."

(2) (1860) 8 H. L. C. 183.

BENNETT J.
1942
LINDOP, *In re.*
LEE-BARBER *v.* REYNOLDS.

holding that there was no common law presumption of survivorship in such a case. The section does not assume the possibility of proof that two deaths occurred exactly at the same moment, and apparently excludes it. If no order is made, the section operates, and the wife as the younger is deemed to have survived her husband. The evidence is not sufficient to displace the presumption, and no order should be made.

Hunt for the defendant Mrs. Lee-Barber, the husband's sister and sole next of kin. The section applies to the ordinary case of commorientes, where on the evidence it is uncertain which died first. But this is a very exceptional case and the only evidence before the court is that of two witnesses who agree that both husband and wife were killed by the blast of the explosion instantly and simultaneously. The words "subject "to an order of the court" enables the court to make an order which will exclude the section and do better justice. It is only reasonable in the circumstances that the man's property should go to his own next of kin, and the wife's to hers. The evidence is that, though two bombs fell near, both were killed by the bomb which burst in the house. The court is enabled by this proviso to say that the interval of time between the deaths is so short that humanly speaking, both died simultaneously, and the effect of the section may be excluded. In *Wing* v. *Angrave* (1) the House of Lords clearly treated simultaneous death as one of the possibilities for which neither testator had provided. [He referred to the speech of Lord Simon L.C. in the House of Lords in reference to the deaths of Lord Stamp and Mr. Wilfrid Stamp in an air raid.—Hansard, House of Lords, September 10, 1941.]

Mulligan in reply. The word "deemed" at the end of the section appears to set aside any such general discretion as is contended for. In *Underwood* v. *Wing* (2), referring to the decision of Romilly M.R. in *Wing* v. *Angrave* (1), Lord Cranworth L.C. says: "It cannot be assumed to be proved, "or probable, or possible, that two human beings should cease "to breathe at the same moment of time." If there is the least doubt whether these two people died simultaneously, then the section operates and the wife must be deemed to have survived.

Nesbitt referred to Tristram & Coote's Probate Practice, 18th ed., pp. 254–256.

Cur. adv. vult.

(1) 8 H. L. C. 183.

(2) (1855) 4 De G. M. & G. 633, 661.

BENNETT J. If Mrs. Lindop survived Mr. Lindop for a moment of time, however brief, the effect will be that Mr. Lindop's residuary estate, which is of a value of about 1250*l.*, will have become for that brief moment Mrs. Lindop's property and will pass under her will either to her mother or to her brothers and sisters. On the other hand, if Mr. Lindop survived his wife or died at exactly the same moment as she did his residuary estate will not be disposed of by his will but will devolve upon the last defendant, his sister, Mrs. Lee-Barber, as his sole next of kin and the person entitled to his estate under the provisions of the Administration of Estates Act, 1925.

Had the deaths occurred in similar circumstances in or before the year 1925 there would have been no doubt, I think, as to the destination of Mr. Lindop's residuary estate or as to the fate of the legacy of 200*l.* given by Mrs. Lindop to her husband. If the first two defendants had come to a court of law or of equity claiming that as Mrs. Lindop's executors they were entitled to Mr. Lindop's residue they would have been told that they must prove that Mrs. Lindop survived her husband: and if all the evidence they had been able to adduce had been the evidence to which I shall have presently to refer I have no doubt but that it would have been adjudged that their proof was insufficient and that Mr. Lindop's residuary estate would have devolved upon his sister, the last defendant, as his sole next of kin. If the plaintiff, as executor of Mr. Lindop, had claimed from his wife's executors the legacy of 200*l.* given to him by her will he, too, would have been told to prove that Mr. Lindop survived his wife: he, too, would have been adjudged to have failed in his proof and the legacy given to him by his wife would have lapsed for the benefit of her residuary legatee: see *Wing* v. *Angrave* (1).

But the law was reformed in the year 1925 and since that year the rights of the parties have to be considered and determined in the light and with the guidance of the provisions embodied in s. 184 of the Law of Property Act, 1925. In my judgment, having had the benefit of hearing the language of the section ably discussed by counsel, the meaning and effect of these provisions are not open to serious doubt. Before discussion and argument the points were not so clear. The meaning I put upon the language of the section is this: once it has been proved (as it has been in the present case) that two or more

---

(1) 8 H. L. C. 183.

BENNETT J.
1942
LINDOP, *In re.*
LEE-BARBER *v.* REYNOLDS.

persons have died in circumstances rendering it uncertain which of them survived the other or others a presumption of fact arises, the presumption being that the deaths occurred in the order of seniority. The section, however, gives rise to nothing more than a presumption, that is to say, the law will act upon the footing that death has occurred in the order of seniority unless and until evidence to the contrary is forthcoming. The presumption is one capable of being rebutted, and, in my judgment, the words " subject to any order of the court " find a place in the section to make it clear that the statutory presumption is a rebuttable presumption. The effect of the words is to enable the court, although the circumstances in which the persons have died are such as to make it uncertain which survived, to receive evidence upon the question, and, if the evidence is such as to displace the statutory presumption, to act upon that evidence. I do not think these words give, as Mr. Hunt suggested they did, a discretion to the court to disregard the statutory presumption if the court came to the conclusion that it would be unfair or unjust to act upon it. It seems to me that the meaning I think ought to be given to the words is a possible one and it gives rise to no difficulty.

In the present case evidence has been adduced on behalf of the last defendant, Mrs. Lee-Barber, Mr. Lindop's sister, which proves, so it is said, not that Mr. Lindop survived his wife but that he died at exactly the same moment of time as she did. The improbability of two persons dying at exactly the same moment was observed upon by Lord Cranworth in the course of his judgment in *Underwood* v. *Wing* (1), which I will read : " In the report of the case before the Master of "the Rolls, (Romilly M.R.) his Honour is represented in one "passage to have said that he must assume that Mr. and Mrs. "Underwood both died together. From personal communica"tion with his Honour, I know that he is not aware that he "ever used such an expression, and all he ever meant to say "was that the property must be distributed just as it would "have been if they had both died at the same moment. It "cannot be assumed to be proved, or probable, or possible, that "two human beings should cease to breathe at the same "moment of time, for that is hardly within the range of "imagination, and to adjudicate on such a principle would, I "think, be proceeding on false data. But the real ground to

---

(1) 4 De G. M. & G. 660.

"proceed on is that it cannot be proved which died first. "They both probably died within a few seconds of each other, "but which died first it is impossible to say." Time being infinitely divisible, the fact of two persons dying at exactly the same moment of time is so highly improbable that the evidence relied upon to prove it must be looked upon closely and critically; and it must not be forgotten that the burden of proof is upon Mrs. Lee-Barber to rebut the statutory presumption. I am not concerned with the question whether two persons were killed at the same moment. I am concerned with quite a different question, namely, whether two persons died at the same moment. Two birds may be killed, each being struck at exactly the same moment by a different pellet coming from the same cartridge; there may well be a considerable period of time between their deaths.

[His Lordship reviewed the evidence in detail and concluded:] Taking into account all the matters in Dr. Simpson's evidence to which I have referred, having in mind the infinite divisibility of time and the doubt whether the doctor had really applied his mind to the question of fact to be proved, I have come to the conclusion that Mrs. Lee-Barber has not discharged the burden of rebutting the statutory presumption of fact and that she has not proved what she set out to prove, namely, that life in Mr. and Mrs. Lindop became extinct at exactly the same moment of time. The provisions of the section, therefore, come into operation. Mr. Lindop was some ten years older than his wife. I must presume that he died some brief moment before his wife and that during that same brief moment she became entitled to his residuary estate, which accordingly is disposed of by her will and must be paid to the first two defendants as her executors.

Solicitors: *Church, Adams, Tatham & Co., for G. J. Lee-Barber, Torquay; Stooke-Vaughan, Webster, Webster & Co., for Alfred Burrow, Cullompton.*

H. L. L.

UTHWATT J.

1942 June 2.

SUN LIFE ASSURANCE SOCIETY *v.* RELTON.

Emergency legislation—Mortgagor and mortgagee—Mortgage of property to assurance society—Collateral mortgage of policy issued by mortgagee—Default in payments under mortgages—Agreement between mortgagor and mortgagee—Mortgagor to convey and release property and surrender policy to mortgagee free from equity of redemption—Mortgagee to make cash payment to mortgagor and release mortgagor from covenants in mortgages for payment—Necessity to obtain leave of court—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*), (*ii.*), (*iv.*)—*Liabilities* (*War-Time Adjustment*) *Act,* 1941 (4 & 5 *Geo.* 6, *c.* 24), *s.* 26, *sub-s.* 2.

In 1934 the defendant executed a mortgage of certain property to the society to secure the repayment of a principal sum and of interest thereon and by a collateral mortgage of even date assigned to the society a policy of assurance on his life granted by the society and the moneys thereby assured. After November 1, 1941, he did not pay anything to the society on account of interest or otherwise and ultimately, by a conveyance undated at the date of this summons but signed and sealed by the defendant, the defendant, in consideration of 15*l.* expressed to be paid by the society to him and of the release by the society therein contained, was expressed to convey and release to the society the property free from all right or equity of redemption and the society was expressed to release him from his covenants to pay the principal, interest and redemption charge under the principal mortgage and from the payment of premiums and other moneys secured by the collateral mortgage. The conveyance was not formally delivered pending the hearing of this summons:—

Held, that, on the true construction of the Courts (Emergency Powers) Acts, 1939-1941, the society, on completion of its purchase of the equity of redemption in the property and the policy, would not be at liberty to take possession of the property and to treat the policy as surrendered without obtaining the leave of the court under those Acts.

Smart Brothers v. *Ross*, ante p. 158, followed.

PROCEDURE SUMMONS.

In June, 1934, the defendant mortgaged house property to the society to secure 640*l.* and interest, the principal sum being repayable by instalments. By a collateral mortgage of even date he mortgaged a policy of assurance on his life, granted by the society to him, as further security. At the end of 1940 the defendant wrote to the society: "As things "have been getting worse instead of better and I had to take "a job as journeyman, it was impossible for me to continue "payment and [sic] plus rates and taxes. I have therefore "been compelled to vacate the premises" [which he had mortgaged] "and to put the property up for sale with vacant "possession and, having no other saleable effects, I have no "other alternative but to sell the property and pay off the "mortgage plus accruing principal and interest or to hand "over the keys to you."

Following that there was an interview between the society and the defendant, as a result of which the defendant wrote to the society in March, 1941, saying that at the moment he was unemployed and was hoping for a vacancy, and that he could not expect more than an average wage of 4*l*. 10*s*. a week and was unable to make any offer at the moment to make good defaults in the payments due to the society. On October 18, 1941, he wrote to the society: "I would be obliged "if something could be done to purchase my equity in this "property, as suggested by you. Owing to continuous "demands, which mean distress warrants being issued, I find "it more than I can do to keep these paid" and he went on to state his financial difficulties. In the result the society agreed to buy the defendant's equity of redemption in the property and in the policy, on the footing of releasing him from all his obligations to it and also on the footing of its taking over all the obligations to which he was subject in respect of the property with regard to road charges, for 15*l*.; and his solicitors took the view that that was a perfectly fair bargain.

The question raised by the summons was whether, on those facts and on the true construction of the Courts (Emergency Powers) Acts, 1939–1941, the leave of the court was necessary to enable the society to take possession of the property sold to it.

Raymond Jennings for the society. The principle established by the decision of the Court of Appeal in *Smart Brothers, Ld.* v. *Ross* (1) is applicable only to a hire-purchase agreement, and ought not to be extended to a mortgage. The power of a mortgagee to take possession is not express, but is inherent in his rights as a mortgagee: *Wood* v. *Smallpiece* (2). What distinction there is between extinguishing an equity of redemption by foreclosure and extinguishing it by sale, it is difficult to see. It is difficult, also, to find out the limits of the principle established in *Smart Brothers, Ld.* v. *Ross* (1)

(1) Ante p. 158.
(2) Ante p. 190, 195.

in which case, it is to be remembered, the judgments of MacKinnon and Clauson L.JJ. were not given on the same ground. The present case is much more like *Wood* v. *Smallpiece* (1), in which case the equity of redemption in the property was destroyed. Therefore, it should not be necessary to obtain the leave of the court under the Acts and the society should be able to take possession of the property and to treat the policy as having been surrendered.

H. E. Salt (for *R. R. A. Walker*, on war service) for the defendant. The case is covered by *Smart Brothers, Ld.* v. *Ross* (2) and the society cannot take possession of the property or treat the policy as having been surrendered without first obtaining the leave of the court under the Acts.

UTHWATT J. There can be no doubt, I think, but that the bargain between the society and the defendant for the sale of the mortgaged properties is effective and its validity is not impeached by the Courts (Emergency Powers) Acts, 1939–1941. The question is whether those Acts place an embargo on its taking possession of the property by reason of the prohibition against proceeding to exercise a remedy contained in the Acts.

Mr. Jennings has argued that the society, if it takes possession, is exercising a right which it already had under the mortgage and which is also, in the events which have happened, only the exercise of a normal incident attached to its right of property in the mortgaged land and that, therefore, the society can take possession of the land without first obtaining the leave of the court under the Acts.

Were the matter res integra I should accept that argument, but, without discussing in detail the principles which underlie the judgments of MacKinnon and Clauson L.JJ. in *Smart Brothers, Ld.* v. *Ross* (2), it appears to me that I am precluded by that decision from determining that the case falls outside the Acts. I propose to leave the matter at that, resting my decision exclusively on the authority of that case and, as I see the matter, the applicability of the principles embodied in those two judgments to the case before me.

The result is that I declare that on the true construction of the Courts (Emergency Powers) Acts, 1939–1941, possession cannot be taken under the mortgage of the property and the security comprised in the mortgage of the policy cannot

---

(1) Ante p. 190, 195.

(2) Ante p. 158.

UTHWATT J.

1942

SUN LIFE ASSURANCE SOCIETY v. RELTON.

be realized without the leave of the court under the Acts. The order will be confined to that declaration. If leave under the Acts is desired, the society can take out the necessary summons in chambers and the order will go as a matter of course. All the evidence is before the court.

Judgment for the plaintiff.

Solicitors for the plaintiff society: *Church, Adams, Tatham & Co.*

Solicitors for the defendant: *R. J. Twyford & Co., for E. A. Barton, Whitstable.*

K. R. A. H,

MORTON J.

1942

June 11.

In re STYLER.

STYLER *v.* GRIFFITH.

Family provision—Principle on which court will act—Testamentary disposition unreasonable—Husband's application—Wife's estate bequeathed to daugher of first husband—Most of estate derived from first husband—Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1.

In exercising jurisdiction under the Inheritance (Family Provision) Act, 1938, the court will not interfere with a will merely because it appears suitable that provision should be made for a particular person, but must, before making provision or larger provision for any applicant, find that, as a result of the testamentary disposition, the applicant has been treated unreasonably.

A testatrix agreed with her second husband that, on his making a will in her favour, she would make a will giving the income of her estate to him for life, and the two wills were accordingly made. The greater part of her estate was, however, derived from her first husband, and she subsequently made a will bequeathing all her property to her daughter by that husband and making no provision for her second husband who survived her. He took out a summons under the Inheritance (Family Provision) Act, 1938, for reasonable provision to be made for him out of the estate for his maintenance:—

Held, that, in the circumstances, it would not be right to order that such provision should be made.

In re Pointer [1941] Ch. 60, criticized.

ADJOURNED SUMMONS.

The testatrix, Lillian Styler, bequeathed all her real and personal estate to Lillian Gwendoline Griffith, who was her daughter by her first husband, and appointed her sole executrix

MORTON J.
1942
STYLER, *In re.*
STYLER *v.* GRIFFITH.

of her will. The greater part of the estate of the testatrix was derived from her first husband. No provision having been made for her second husband, Albert Styler, he took out a summons under the Inheritance (Family Provision) Act, 1938, asking for reasonable provision to be made for him out of the estate for his maintenance. The grounds on which he made his application were that he had agreed to make a will in his wife's favour, that she had agreed to make a will under which he was to receive the income of her estate for life, and that those wills had been made. There was no agreement that those wills should not be revoked. It was stated in the evidence that the husband had given up his employment at his wife's request, so that he could live with her and be her constant companion. She died on January 30, 1941, about two years after the marriage. Lillian Gwendoline Griffith, who was married and had a family of three young children, was aged 38 years at the date of the death of the testatrix and her husband was earning about 5*l.* a week. Albert Styler was 65 years of age at that date, and his annual income was approximately the same as the combined income of Mrs. Griffith and her husband. The estate of the testatrix was approximately of the value of 1200*l.*

Danckwerts, for the husband. The total amount of the income of the estate of the testatrix not being great, 20*l.* a year should be paid to the husband for the rest of his life by way of maintenance, subject to his remarriage. He gave up his work on the footing that mutual wills would be made.

Lindner for Mrs. Griffith. The court will only give relief to a husband in exceptional circumstances: *In re Sylvester* (1). Here it is established that the husband had ample means and did not need assistance. That an application may succeed, it must be shown that some injustice has been done to the applicant as a result of the dispositions made under the will: see *In re Brownbridge* (2).

Danckwerts replied.

MORTON J. It is suggested that this is a case in which reasonable provision has not been made for the husband. There are one or two observations in the cases decided on this Act to which I desire to refer, although I fully appreciate that every case must rest on its own facts. In *In re Brownbridge* (2), Bennett J. said that the Act did not

(1) [1941] Ch. 87, 89.

(2) (1942) 193 L. T. Jour. 185.

throw on a testator a duty to make provision for his dependants. It only gave the court the right to interfere if it came to the conclusion that the dispositions which were made were unwarranted. In that case Bennett J. did not think it right to interfere with the testator's disposition. I respectfully agree with the observations which he made. I do not think that a judge should interfere with a testator's dispositions merely because he thinks that he would have been inclined, if he had been in the position of the testator, to make provision for some particular person. I think that the court has to find that it was unreasonable on the part of the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision. Again, in *In re Sylvester* (1), Farwell J. said: "I do not consider that in "the ordinary way applications by husbands for this sort of "assistance should readily be entertained. Prima facie a "husband should be able to maintain himself, and ought not "to ask the court to give him, out of his wife's estate, more than "she has thought fit to provide for him. There are, of course, "exceptional cases in which such an application may be "justified, but personally I should not be very willing to assist "husbands in cases of this sort, unless the circumstances were "indeed exceptional." With that observation also I respectfully agree. I think the court would, however, regard it as a circumstance of some importance, if the husband were unable to earn a living wage and did not possess sufficient means for his support. It is to be noted that in *In re Sylvester* (1) the husband had given up his work on his marriage. He had had 26 years of married life, he was 68 years old at the time when the judgment was given, and his wife, out of an estate of 19,000*l.* had only provided 1*l.* a week for him although she had made larger provisions for a sister and a brother. Another case in which provision was made for a husband under the Act was a decision of my own, *In re Pointer* (2). The wife's estate was more than 19,000*l.* and she had left nothing to her husband, whose means were modest, yet sufficient to enable him to live. I said in my judgment: "With regard to the widower, I have felt very "considerable hesitation, but I feel that, in the circumstances, "he having been deprived of the society of his wife since 1893, "and they having remained on good terms, and having regard "to his age, his physical infirmities and the scantiness of his

(1) [1941] Ch. 87.

(2) [1941] Ch. 60, 67.

"means, it would be reasonable to make some small provision "for him to assist him in his declining years. In his case, I "propose to direct that the income of one-fifteenth of the "residuary estate, or a sum of 5*s*. a week, whichever is the "smaller, be paid to him during his life, subject" to the provisions of s. 1, sub-s. 2 (*a*), of the Act. Although I did not allude to it in my judgment, I was, as I well recollect, much impressed in favour of the view that some provision should be made for the husband by the fact that, although his wife had left him without, apparently, any good reason, he had treated her and his granddaughter, who was the principal beneficiary under the will, very generously having regard to his small means. Having now had more experience of administering the Act since I decided that case, I do not think that I should now make any provision, as I did there, for a husband with a pension of 180*l*. a year, an annual income of 124*l*. from investments, and 25*l*. a year net from property unless the circumstances were exceptional.

In the present case one of the considerations which the court might properly take into account is that, according to the evidence, substantially the whole of the estate of the testatrix was derived from her first husband. This tends to make it not unreasonable that she should think it right to give her property directly to the daughter of her first husband rather than to give an interest in it to her second husband.

It is clearly contemplated by s. 1, sub-s. 4, of the Act that such an application as the present may be made in the case of an estate not exceeding 2000*l*. and, in proper circumstances, I should not hesitate to make some provision out of an estate worth about 1200*l*., but, generally speaking, I do not think applications in the case of small estates are to be encouraged.

Taking all the circumstances into account, I do not think it can be said that it was unreasonable or unwarranted for the testatrix to make no provision for her husband out of her estate. I have endeavoured to give due weight to every consideration in the case, and I do not feel that it would be right in all the circumstances to order that any such provision should be made. The application will, therefore, be dismissed.

Solicitors: *Neave & Neave, for Whiteley & Pickering, Redditch; Waterhouse & Co., for Buller, Cross & Jeffries, Birmingham.*

J. L. D.

BILSTON CORPORATION *v.* WOLVERHAMPTON CORPORATION.

SIMONDS J.

1942
Apr. 23, 24.

Injunction—Opposition to bill in Parliament—Agreement between local authorities—Provision against opposing bill—Opposition in breach of agreement.

By an agreement (later confirmed and made binding on the parties by a local Act) made between the B. Commissioners and the W. Corporation relating to the water supply in their areas it was agreed that the W. Corporation should not at any time oppose any application by the Commissioners to Parliament for the purpose of enabling the commissioners to obtain a supply of water, provided that no such supply or any part thereof, was obtained within the water district for the time being of the W. Corporation. The introduction of a bill into Parliament, enabling the B. Corporation (successors of the B. Commissioners) to develop additional sources of supply outside the water district of the W. Corporation having been obtained, the W. Corporation lodged a petition to oppose the bill:—

Held, that the corporation, in opposing the bill, were acting in breach of their obligation, but that the matter was for the consideration of Parliament and not one in which the court, although it had jurisdiction to do so, ought to intervene by injunction.

WITNESS ACTION.

By s. 6 of the Bilston Commissioners (Water) Act, 1893, an agreement under seal between the Bilston Commissioners and the Wolverhampton Corporation, dated November 18, 1892, by which the water rights of the parties were regulated, was confirmed and made binding on the parties thereto. By cl. 4 of the agreement it was provided that the commissioners "shall be at liberty to obtain water from any person or persons "or corporation and from any source or place other than a "source or place within the water district for the time being "of the [Wolverhampton] Corporation and shall be at liberty "to supply the water so obtained to any person or persons "or corporation and at any place within the commissioners' "water district for the time being but not within the water "district for the time being of the corporation. The corporation shall not at any time oppose any application by the "commissioners to Parliament . . . . for the purpose of "enabling the commissioners to obtain a supply of water. "Provided that no such supply or any part thereof is obtained "within the water district for the time being of the corporation." In 1941, Bilston Corporation, being the successors of the commissioners, obtained the introduction of a bill into Parliament to enable them to develop additional sources of supply of water, no such supply or any part thereof being obtained within the water district of Wolverhampton Corporation. Wolverhampton Corporation lodged a petition opposing the bill. Bilston Corporation, thereupon, began this action against Wolverhampton Corporation, alleging that Wolverhampton Corporation, in breach of the agreement, wrongfully threatened and intended to oppose the bill, and claiming an injunction to restrain them from doing so.

Fitzgerald K.C. and *Danckwerts* for Bilston Corporation. The court has power to interfere by injunction to restrain a person from petitioning Parliament. In view of the provision in the agreement, an injunction should be granted restraining Wolverhampton Corporation from opposing the Bilston Corporation bill. [They referred to *Att.-Gen.* v. *London and Home Counties Joint Electricity Authority* (1).]

Turner K.C. and *Neep* for Wolverhampton Corporation. On the construction of the agreement Wolverhampton Corporation is not precluded from opposing the bill. If, however, they are precluded from doing so, the case is not one in which an injunction should be granted. The court is reluctant to interfere in cases of this kind. [They referred to *Lancaster and Carlisle Ry. Co.* v. *North Western Ry. Co.* (2); *Att.-Gen.* v. *Manchester and Leeds Ry. Co.* (3); *Heathcote* v. *North Staffordshire Ry. Co.* (4); *Steele* v. *North Metropolitan Ry. Co.* (5); and *In re London, Chatham and Dover Ry. Arrangement Act* (6).

Fitzgerald K.C. replied.

SIMONDS J., having held on the construction of the agreement that Wolverhampton Corporation were acting in breach of their obligation in opposing the bill, continued: The question then arises whether this is a matter with which the court ought to interfere by injunction. The court clearly has power to enforce a contractual obligation entered into by a person or a corporation that he or it will not apply to Parliament or will not oppose an application to Parliament by another person. That jurisdiction was asserted over and over again by Lord Chancellors in the middle of the last century, but it is significant that the assertion was always accompanied by the statement that it was difficult to conceive a case in which such a jurisdiction should be exercised, and that when, in *Heathcote* v. *North Staffordshire Ry. Co.* (1), Shadwell V.-C. did grant such an injunction, it was dissolved by Lord Cottenham L.C. In no other case which has been brought to my notice has such an injunction been granted. I do not propose to grant an injunction of this kind for the first time. I do not think it is necessary for me to add to the reasons so clearly stated by Lord Chancellors in such cases as *Att.-Gen.* v. *Manchester and Leeds Ry. Co.* (2); *Heathcote* v. *North Staffordshire Ry. Co.* (1); *Steele* v. *North Metropolitan Ry. Co.* (3); and *In re London, Chatham and Dover Ry. Arrangement Act* (4).

---

(1) [1929] 1 Ch. 513.
(2) (1856) 2 K. & J. 293.
(3) (1839) 3 Jur. 379.
(4) (1850) 2 Mac. & G. 100.
(5) (1867) L. R. 2 Ch. 237.
(6) (1869) L. R. 5 Ch. 671.

Perhaps, however, I may add these words of my own as explaining why, in my view, it is difficult to conceive a case in which this jurisdiction, although it undoubtedly exists, can properly be exercised. It is the function of a court of law to ascertain the facts and to apply to those facts as ascertained the established principles of law. I do not mean law in a narrow sense. I include also rules of equity and those rules of public policy which have become part of the substantive law. The function of Parliament is wholly different. It is to consider public interest, and on that basis to give statutory powers to individuals or authorities. Where, as here, the conflict is between two local authorities, each seeking in the public interest to perform the duties confided to it by Parliament, considerations which are wholly inappropriate to be discussed by this court will have to be taken into account by Parliament. Questions of policy in the broadest sense which have no place in the consideration of a case in this court are, if not the only matters, the substantial matters which Parliament has to take into account. Accordingly, it would, in my view, be improper for the court to intervene to prevent those matters being put before Parliament in order that, on the broad questions of public policy, it may be determined whether or not a party should be released from some contractual obligation. That is a matter falling properly within the purview of Parliament which is informed of what has taken place and is competent to determine

(1) 2 Mac. & G. 100.
(2) 3 Jur. 379.
(3) L. R. 2 Ch. 237.
(4) L. R. 5 Ch. 671.

whether an obligation heretofore imposed on a person or corporation ought to remain binding on him. I can see no difference in this regard between a case where the contractual obligation is not to apply to Parliament and one where it is not to oppose the application by another party.

This further observation I should make. It is true that the contractual obligation created by the agreement of 1892 obtained additional force by reason of the fact that it was confirmed by the Act of 1893 so that what was theretofore no more than a contractual obligation became also a statutory obligation. I am unable, however, to see any distinction for the present purpose between a contractual and a statutory obligation. A party may petition Parliament equally for release from a contractual obligation as from a statutory obligation. In either case the matter is one appropriate to be considered by Parliament itself and not by this court. Accordingly, on the assumption which I make that Wolverhampton Corporation are acting in breach of their contractual obligation in seeking to oppose in Parliament the bill promoted by Bilston Corporation, I hold that the case is not one in which this court ought to intervene by injunction to restrain them from doing so, and, accordingly, the action must be dismissed, with costs.

Judgment for defendants.

Solicitors: *Lees & Co., for A. V. Williams, Bilston*; *Sharpe, Pritchard & Co., for Town Clerk, Wolverhampton.*

J. L. D.

MORTON J.
1942
June 16.

In re INCHCAPE (EARL OF).

CRAIGMYLE *v.* INCHCAPE.

Practice—Costs—Slip rule—Amendment of order—"Error arising from "accidental slip or omission"—Omission of counsel to ask for certain costs—R.S.C., O. XXVIII., *r.* 11.

A judgment given on a summons to determine the domicil of a testator decided the question raised and the usual order for the taxation and payment of the costs of all parties out of the estate was made. Considerable costs, however, had been incurred before the summons was issued in obtaining evidence and advice on the question in England and Scotland, but counsel did not ask these costs to be included and they were not provided for:—

Held, that, it being through an "accidental omission" of counsel within R.S.C., O. XXVIII., r. 11, that these costs were not provided for, the court had jurisdiction to amend the order by including the costs.

MOTION.

On July 23, 1941, Morton J. gave judgment on a summons entitled *In re the Earl of Inchcape, deceased. Craigmyle* v. *Inchcape.* The plaintiffs were the trustees under Lord Inchcape's will, and the defendants were various parties beneficially interested, including some infants, and the question to be decided was the domicil of Lord Inchcape at the date of his death. Before the summons was issued considerable costs had been incurred in England and Scotland, particularly by the guardian ad litem of the infant defendants, in collecting evidence in regard to the domicil, taking the opinion of counsel, and so on. At the conclusion of the judgment of Morton J., counsel for the plaintiffs said: "The costs of all "parties as between solicitor and client will come out of the "estate?" Morton J. replied: "Yes. There is nothing "further that arises on the summons?" Counsel replied: "No." Then another counsel engaged in the case asked the judge about the costs of the transcript of the shorthand note of the proceedings and judgment, and that was dealt with in the order which his lordship made. There was no application by any of the counsel concerned that the judge should allow the costs mentioned which had been incurred before the issue of the summons. The order made by Morton J., omitting formal parts, was in the following terms: "This court doth declare that the plaintiffs, the executors of "the will and codicils of the above-named testator, ought to "administer the estate of the testator on the footing that he "died domiciled in England. And it is ordered that the costs "of the plaintiffs and of the defendants of the said application "be taxed by the taxing master as between solicitor and client, "including in such costs the costs of taking a shorthand note "of the proceedings and judgment and of making one transcript for the judge. And it is ordered that such costs be "retained and paid by the plaintiffs out of the estate of the "testator." The present motion was on the part of two infant defendants to the summons, and asked, under R. S. C., O. XXVIII., r. 11, that the order made therein, dated July 23, 1941, might be corrected by substituting for that part of the order which dealt with the taxation of costs the following: "And it is ordered that it be referred to the taxing

MORTON J.

1942

INCHCAPE (EARL OF), *In re.* CRAIGMYLE *v.* INCHCAPE.

"master to tax the costs of the plaintiffs and the defendants "as between solicitor and client of and incidental to this "application, including their costs of and incidental to taking "advice in England and Scotland and obtaining evidence as "to the domicil of the above-named testator in anticipation "of and in connection with this application and including the "costs of taking a shorthand note of the proceedings and "judgment and of making one transcript for the judge."

Stone for the applicants. The error in the order made by Morton J. was due to the accidental omission of counsel to ask for these costs, and there is, therefore, power to correct the error under O. XXVIII., r. 11. If the order made correctly expressed the intention of the court, it could not be altered under this rule, but these costs were not referred to and the court did not direct its attention to them. He referred to *Preston Banking Co., Ld.* v. *William Allsup & Sons* (1); *MacCarthy* v. *Agard* (2); *Barker* v. *Purvis* (3). The present case is covered by *Fritz* v. *Hobson* (4), where costs which should have been, but were not, applied for were afterwards allowed by the court under a rule identical with the present O. XXVIII., r. 11.

J. H. Stamp for the plaintiffs.

H. C. Marks for the remaining defendants did not oppose the motion.

MORTON J. I have a very distinct recollection of this case, and I am satisfied that, if I had been asked at the hearing to allow these costs to be taxed as between solicitor and client and paid out of the estate, I should have made the order as asked.

When the present application was first made to me, I felt some doubt whether the case was one which came within the provisions of O. XXVIII., r. 11, and, accordingly, I directed that the matter should be argued before me on a date to be fixed. Order XXVIII., r. 11, is as follows: "Clerical mistakes "in judgments or orders, or errors arising therein from any "accidental slip or omission, may at any time be corrected "by the court or judge on motion or summons without an "appeal." It is submitted in the present case by Mr. Stone for the infants that there has been an error arising in the order from an accidental omission, that is to say, the accidental omission of the counsel concerned to ask me to deal with these costs. It is clear that, if a judge's attention is directed to a particular point, and, applying his mind to that point, he decides it, there can be no alteration under this rule even if the judge has fallen into some manifest error. It is also established, I think, by *Preston Banking Co., Ld.* v. *William Allsup & Sons* (1) and *MacCarthy* v. *Agard* (2) that, if the error in the order has arisen as a result of deliberate misrepresentation, the case does not come within the rule, as such an error could not, I apprehend, be said to arise from an accidental slip or omission.

---

(1) [1895] 1 Ch. 141.

(2) [1933] 2 K. B. 417.

(3) (1886) 56 L. T. 131.

(4) [1880] 14 Ch. D. 542, 561.

There are two cases which to my mind bear some resemblance to the present case. The first is *Fritz* v. *Hobson* (3), in which a motion for an interim injunction had been adjourned to the trial of the action. No provision was made at the time for the costs of the motion, and liberty to apply was not expressly reserved. At the trial judgment was given for the plaintiff on the substantial questions at issue, with the general costs of the action less 10*l.* for costs of an issue on which he had substantially failed. Plaintiff's counsel omitted to ask for the costs of the adjourned motion, and no express provision was made for those costs in the order. Liberty to apply to the court was expressly reserved. The judgment having been drawn up, passed and entered, the taxing master refused to allow the plaintiff the costs of the adjourned motion. The plaintiff then applied to the court by motion asking that the judgment might be varied or corrected by giving him the costs of the adjourned motion. It was held that either under the liberty to apply reserved by the judgment or implied in the order adjourning the motion, or by virtue of O. XLI.A, which was in precisely the same terms as the present O. XXVIII, r. 11, the court had jurisdiction to order the payment of the costs in question, and a separate order was made directing the taxation and payment of the plaintiff's costs of the motion.

In the course of the argument before Fry J., counsel submitted: "O. XLI.A does not apply. This is not an accidental "slip or omission. Those words mean only an accidental "slip or omission to embody in the order something which the "court in fact ordered to be done; they do not apply to an "accidental omission of counsel or solicitor to ask for, or of

(1) [1895] 1 Ch. 141.
(2) [1933] 2 K. B. 417.
(3) 14 Ch. D. 542.

"the court to provide for, something which ought to have been "provided for." That argument precisely expresses the doubt which I felt when the case first came before me and before this authority had been cited. The error which it is now sought to set right, if it can be properly described as an error, did not arise from an omission to embody in the order something which I in fact ordered to be done, but it arose from an accidental omission of counsel to ask that a particular thing might be done. However, Fry J., after dealing with the other grounds on which he had power to correct the order, said (1): "There is another ground on which, in my opinion, I have "jurisdiction to make the order asked for, namely, under "O. XLI.A. In my view the error in the present case has "arisen from the accidental omission of counsel to call my "attention to the adjourned motion when I pronounced my "judgment, an omission very natural at a time when counsel's "attention was directed to matters of greater importance. "In substance, the motion was before me at the trial, for my "attention was called to the affidavits made upon it. I "recollect quite enough of what took place, and I am confirmed "in my recollection by the notes which I made at the time, "to know that all the affidavits upon the motion were in "substance before me at the trial, and that the various witnesses "who made those affidavits were examined in the course of the "proceedings. On this ground, therefore, I think I have "jurisdiction to make the order." It might be said that there is a distinction between *Fritz* v. *Hobson* (1) and the present case in that in *Fritz* v. *Hobson* Fry J. was dealing with the costs of a motion which, as he says, was in substance before him whereas I am asked now to deal with costs incurred before the issue of the summons, but I think that the reasoning in *Fritz* v. *Hobson* (1) can be applied to the present case. It would appear that Fry J. had sufficient recollection of the whole matter in *Fritz* v. *Hobson* (1) to feel sure that he would have made the order if he had been asked to do so. So, in the present case, I have a sufficiently clear recollection of the evidence which was produced before me as a result of those researches to feel sure that I would have made the order if I had been asked to do so.

Again, in *Chessum & Sons* v. *Gordon* (2), it was held that there had been an error in the judgment arising from an accidental slip or omission within O. XXVIII., r. 11, when the error or omission was that the solicitor engaged in the case had failed to ask for certain costs. The Master of the Rolls said (1): "There can be no doubt that according to the justice "of the case the plaintiffs ought to be paid this sum or "whatever may be allowed as a proper sum upon taxation. "It is satisfactory to know that no technical rule stands in the "way of the court making an order to that effect. In my opinion "the case of *Preston Banking Co., Ld.* v. *William Allsup & Sons* (2) "does not touch the question before us." He also referred, in the course of his judgment, to *Fritz* v. *Hobson* (3) and *Barker* v. *Purvis* (4). The Master of the Rolls referred to that case in the following terms (5): "There the judgment "directed that the defendant should be at liberty to set off "against the sum due to the plaintiff a sum of 453*l.* on account "of interest which the defendant had paid on behalf of the "plaintiff. The amount of 453*l.* was arrived at by an innocent "misstatement by the defendant that he had paid this sum, "whereas it was discovered, after the judgment was drawn "up, that the defendant had by mistake overstated the amount. "The court allowed the judgment to be corrected under "O. XXVIII., r. 11, holding that there was an error in the judg-"ment which arose from an accidental slip of the defendant."

---

(1) 14 Ch. D. 542, 561.

(2) [1901] 1 Q. B. 694.

Thus, I have had cited to me cases where the omissions arose by a slip on the part of counsel, on the part of a solicitor, and on the part of a party to the action. Having regard to those authorities, I am satisfied that I can make the order asked for under the provisions of O. XXVIII., r. 11. It is true that when the case was before me, I made the order which I intended to make in regard to the costs for which I was asked to make provision, but there was an accidental omission on the part of counsel, and I did not make the order which I would have made if that accidental omission had not occurred. I am glad to find it possible to give this construction to the rule, as I think it is a rule of great convenience, and in the present case real hardship would have resulted if I had not felt able to make the order asked for on this motion. I direct that the costs of this application as between solicitor and client should be paid out of the estate.

Solicitors: *Rooper & Whately*; *Jacobson, Ridley & Co.*

---

(1) [1901] 1 Q. B. 698.
(2) [1895] 1 Ch. 141.
(3) 14 Ch. D. 542.
(4) 56 L. T. 131.
(5) [1901] 1 Q. B. 699.

H. L. L.

FARWELL
J.

1942
June 11, 17.

In re JACOBS' AND STEDMAN'S CONTRACT.

Emergency legislation—Vendor and purchaser—Sale of land—Apportionment of "rates, taxes and other outgoings"—Instalment of war damage contribution—War Damage Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 12), *s.* 18; *s.* 20, *sub-s.* 1.

An instalment of war damage contribution which a vendor who, on January 1, 1942, was the owner of the sole proprietary interest in the property within the meaning of s. 23 of the War Damage Act, 1941, was liable to pay on July 1, 1942, being a payment of a capital nature:—

Held, not to be apportionable between vendor and purchaser under a contract for sale made in January, 1942, providing for the apportionment of "all rates, taxes and other outgoings" between vendor and purchaser, if necessary.

ADJOURNED SUMMONS.

By a contract dated January 23, 1942, the vendor, Mark Jacobs, agreed to sell and the purchaser, Edith Stedman, agreed to purchase a house in Camberley, Surrey, for 1850*l.*, completion being fixed for January 31, 1942. Later, it was agreed between the parties that February 25 should be regarded as the date for completion. The property agreed to be sold was a contributory property as defined in s. 19 of the War Damage Act, 1941. On January 1, 1942, the legal estate in fee simple in the property was vested in the vendor. The property was subject to a short tenancy within s. 95, sub-s. 1, of the Act, and it was not subject to any mortgage. Accordingly, the vendor then was the owner of the only proprietary interest in the property, and under s. 23, sub-s. 1, and s. 20, sub-ss. 2 and 3, of the Act was liable to pay the instalment of 2*s.* in the pound of the contributory value of the property payable on July 1, 1942 (1). The contract was made subject to the General

---

(1) By the War Damage Act, 1941, s. 19: "The properties "liable to the said contributions ". . . . shall, save as otherwise "provided . . . . be every "property—(*a*) the full annual "value of which was ascertained for the purposes of an "assessment under sch. A in "force at any time during the risk "period; . . . ."

Sect. 20.—(1.) "The contribution in respect of any contributory property shall be payable "by five annual instalments becoming due in the year 1941, "and each of the four subsequent "years. (2.) The instalment for "each of the said years shall "become due on the first day of "July in that year, but in relation "to any such instalment regard "shall be had, in so far as the "provisions of this Part of this "Act and of the Fourth Schedule "thereto expressly so provide, to

Conditions of Sale of the Law Society, condition 5 (3) (*a*) of which was as follows: "A purchaser paying his purchase "money, or, where a deposit is paid, the balance thereof, "shall (but subject to the execution of any conveyance which "ought to be executed by him), as from the date fixed for "completion, be let into possession or receipt of rents and "profits." By condition 5 (3) (*b*): "A purchaser shall, as "from that date, pay all outgoings, and up to that date, all "current rents, and all rates, taxes and other outgoings shall, "if necessary, be apportioned, and the balance shall be paid "by or allowed to a purchaser on actual completion, and for "this purpose a purchaser shall be liable to pay a proportionate part of the current rents accrued in respect of the "property, up to and including the date fixed for completion." The vendor took out this summons, asking for a declaration that, on the true construction of the contract (i.) The instalment of contribution payable under the War Damage Act, 1941, in respect of the property on July 1, 1942 (which, under s. 35 of the Act, the vendor was liable to pay notwithstanding the sale), was an "outgoing" within the meaning of condition 5 (3) (*b*) of the Law Society's Conditions of Sale, and (ii.) that the contribution ought, as between the vendor and the purchaser, to be apportioned as at the date fixed for completion on the footing that the instalment was payable in respect of the year 1942.

Jopling for the vendor. War damage contribution is an outgoing, and one which is apportionable. If it is not apportionable, the instalment in the present case should be paid by the purchaser as it was not payable until after completion. The proper way of dealing with the matter is to apportion the payment between vendor and purchaser as from the date fixed for completion. He referred to Williams

"the circumstances prevailing on "the first day of January in that "year (hereinafter referred to as "the relevant date)."

Sect. 23: "An instalment of "contribution becoming due in "any year in respect of any "contributory property shall, save "as otherwise provided in this "Part of this Act if there is at "the relevant date only one "proprietary interest subsisting "in the whole of that property, "be payable by the owner at that "date of that interest."

Sect. 82: "Contributions made "and indemnities given under "Part I. of this Act . . . . shall "be treated for all purposes as "outgoings of a capital nature."

FARWELL J.

1942

JACOBS' AND STEDMAN'S CONTRACT, *In re.*

on Vendor and Purchaser, 4th ed., p. 563; *Lawes* v. *Gibson* (1); *Midgley* v. *Coppock* (2).

K. E. Kemp for the purchaser. This is not an apportionable outgoing within the meaning of the contract since it is not, like rent, rates or taxes, a payment to be made out of income, but is a payment to be made out of capital: see s. 82 of the Act. Moreover, it relates to a risk period which expired in December 31, 1941, for which a purchaser in 1942 cannot be made liable: *In re Bennett* (3); *Country Estates Co.* v. *Graves* (4). The liability is fixed on the vendor, as being the owner on January 1, 1942. If there is any apportionment of such a sum under the Act it can only operate in the case of sales during the risk period covered by the payment. Payments which are apportionable are so because they constitute a charge upon the income of property. See Tithe Act, 1936, s. 13, sub-s. 4, which provides that a tithe redemption annuity shall be deemed to be an income payment.

Jopling replied.

Cur. adv. vult.

FARWELL J., having read the sections of the War Damage Act above set out, continued: The question which I have to determine resolves itself into whether or not this instalment of contribution was an "outgoing" within the meaning of the conditions of sale. There is nothing in the War Damage Act, 1941, which provides for apportionment, and so, if there is to be an apportionment, it must be because it is provided for by the contract. The only condition relied on is condition 5. It is said that the words "and other outgoings" include an instalment of contribution payable under the War Damage Act, 1941, but in my judgment, that is not so. The word "outgoings," generally speaking, does not include payments of a capital nature, and the Act provides, by s. 32, that contributions made under the Act "are to be treated as "outgoings of a capital nature." I can see no ground for thinking that the word "outgoings," as used in condition 5, is intended to be used otherwise than in its ordinary general meaning so as to be capable of being extended to payments of a capital nature, and accordingly, in my judgment, there is no ground for suggesting that this instalment ought to be apportioned between vendor and purchaser. The vendor,

(1) (1865) L. R. 1 Eq. 135.
(2) (1879) 4 Ex D. 309.
(3) [1896] 1 Ch. 778, 784.
(4) [1895] A. C. 113.

therefore, has brought forward a claim which he cannot sustain. There will be a declaration that the instalment of contribution is not an outgoing within the meaning of the contract, and ought not to be apportioned between vendor and purchaser.

Solicitors: *Gustavus Thompson & Co., for Herrington & Carmichael, Aldershot.*

H. L. L.

In re BUTLER'S SETTLEMENT TRUSTS.

BENNETT J.
1942
June 25.

Power of appointment—Power to appoint by deed or will—Will exercising power—Subsequent exercise of power by deed—Trusts inconsistent with those of previous appointment—Effect of exercise of power by will.

Death—Presumption—Evidence—Airman reported missing—Certificate by Air Ministry of presumed death.

A settlement of personalty was made in 1925 under which the settlor reserved a power of appointment among her children or remoter issue, exercisable by deed, revocable or irrevocable, or by will. In 1926 she made a will exercising the power and appointing the property in certain shares among her three children. In 1928 she executed a deed exercising the power, containing a power of revocation, and disposing of the property on trusts which were inconsistent with those of the will. In 1930 the settlor died and her will was proved:—

Held, that the exercise of the power by the deed was valid and effective, could only have been revoked by deed, and was not revoked by the will executed before it.

The settlor's son, an officer in the Royal Air Force, was reported missing in June, 1940, and in March, 1941, the Air Ministry certified that he was missing as the result of air operations and must be presumed to have lost his life on or about June 19, 1940:—

Held, that the certificate was insufficient to enable the court to make an order based on the presumption of death.

ADJOURNED SUMMONS.

By a settlement made on November 20, 1925, Mrs. Josephine Butler settled certain shares which she had transferred to trustees on trust "for all or such one or more exclusively of "the others or other of the children or remoter issue of the "settlor or the husbands or wives of such children or remoter "issue at such age or time or respective ages or times and in "such shares and with such trusts for their respective benefit

BENNETT J.
1942
BUTLER'S SETTLEMENT TRUSTS, *In re.*

"and such provisions for their respective advancement and "maintenance and education at the discretion of the trustees "or any other person or persons and in such manner in all "respects as the settlor shall from time to time by deed "revocable or irrevocable or by will or codicil appoint." The settlor made her will on July 26, 1926, and by cl. 11 she purported to exercise the power contained in the settlement. On September 26, 1928, she executed a deed of appointment by which she purported to exercise the power given to her by the settlement, and she disposed of the settled property on trusts which differed from those contained in cl. 11 of the will. The deed contained a provision that the appointor might at any time or times during her life by any deed or deeds revocable or irrevocable or by will or codicil wholly or partially revoke the appointment thereinbefore contained. The settlor died on October 15, 1930, leaving her surviving three children, two married daughters and a son, Francis Joseph Butler. The settlor's will was proved in the same year.

This summons asked (1.) whether the plaintiffs, as trustees of the settlement, were at liberty to distribute the income of the settled property on the footing that Francis Joseph Butler had died on or about June 19, 1940. He was a pilot officer in the Royal Air Force Volunteer Reserve, and was reported missing. On March 12, 1941, the Air Ministry issued a certificate that he had been reported missing after air operations and must be presumed for official purposes to have lost his life on or about June 19, 1940.

[BENNETT J. said that he could not make the order asked for on the certificate before him, and adjourned the summons into chambers to enable further information and evidence of death to be obtained.]

The summons asked (2.) whether the power of appointment in the settlement was duly exercised by the will of the settlor, or by the deed of appointment.

Humphrey King for the plaintiffs.

Shebbeare for the settlor's daughters. The appointment made by the will is effective. The deed could only affect the provisions of the will in one of two ways, i.e. (1.) by revocation, or (2.) by ademption. It did not come into effect until the death of the settlor. It was incapable of revoking the will, and there was no ademption: *Ford* v. *de Pontes* (1); Wills

---

(1) (1861) 30 Beav. 572.

Act, 1837, ss. 20, 23. The will supersedes anything contained in the deed, and the appointment by deed is inoperative, being later in date. *In re Illingworth* (1); *In re Thursby's Settlement* (2); *In re Wells' Trusts* (3).

Rose for the settlor's grandson. A will is an ambulatory document, and the appointment by this will had no operation during the settlor's life. The deed, however, took effect from the moment of its execution and duly exercised the power of appointment at that time. True, that took effect subject to the power of revocation contained in it, but it never was revoked. The appointment by the will never came into effect at all; there is nothing upon which the appointment it purported to make can operate. It is impossible to revoke an appointment which has never been made: *In re Thursby's Settlement* (2); *In re Moses* (4); *In re Hayes* (5). In the latter case the Court of Appeal left open the question whether it is possible to execute by anticipation a special power not created until after the purported execution.

BENNETT J. The second question asked by the summons is whether on the death of the settlor, the property subject to the trusts of the settlement dated November 20, 1925, became subject to (*a*) the trusts appointed with reference thereto by cl. 11 of the will of the settlor, or (*b*) the trusts appointed with reference thereto by the deed dated September 26, 1928. In my judgment, the question should be answered by saying that the property became subject to the trusts appointed with reference thereto by the deed for these reasons. A will is an ambulatory document and a power of appointment contained in it is not exercised until the death of the testator. For that authority is to be found in the judgments of Vaughan Williams and Cozens-Hardy L.JJ. in *In re Moses* (4). That being so, the deed must operate according to its terms until it has been revoked by some instrument executed in exercise of the power of revocation which it contains. For that authority is to be found in the judgment of Farwell L.J. in *In re Thursby's Settlement* (6). The lord justice in delivering the judgment of the Court of Appeal said: "The law as to "powers of revocation and new appointment has been settled

(1) [1909] 2 Ch. 297.
(2) [1910] 2 Ch. 181.
(3) (1889) 42 Ch. D. 646.
(4) [1902] 1 Ch. 100.
(5) [1901] 2 Ch. 529.
(6) [1910] 2 Ch. 181, 186.

BENNETT J.

1942

BUTLER'S SETTLEMENT TRUSTS, *In re.*

"for more than fifty years by *Pomfret* v. *Perring* (1). A power "of revocation is not a power of appointment, but is a power "the exercise of which is a condition precedent to the exercise "of the power of appointment in question. An appointment, "therefore, in exercise of a power of appointment and of every "or any other power or similar words does not prima facie "refer to powers of revocation, but to powers of appointment." It follows that the will in this case, executed before but proved after the date of the deed, cannot revoke the deed.

Solicitors: *D. C. Bartlett & Co.*

(1) (1854) 5 De G. M. & G. 775.

H. L. L.

SIMONDS J.

1942

June 18, 19, 30.

In re BANCA COMMERCIALE ITALIANA.

Emergency legislation—Trading with enemy—Banker—English branch of enemy bank—Winding-up order—Claims of holders of foreign currency accounts—" Creditors "—Date for ascertaining enemy status—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 3A, *sub-s.* 3*—Defence* (*Trading with the Enemy*) *Regulations* (*St. R. & O.*, 1940, *No.* 1289).

On the outbreak of war with Italy, the Board of Trade made an order under the Trading with the Enemy Act, 1939, appointing a controller to wind up the English branch of an Italian bank. By s. 3A, sub-s. 3, of that Act the distribution of the assets of the business controlled was subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up and the assets available were to be applied in discharging unsecured debts due to creditors of the business who were not enemies in priority to unsecured debts due to any other creditors:—

Held, that holders of foreign currency accounts in the bank, who could not draw thereon in England, and whose only right was to use the deposit for the purchase of a foreign draft payable abroad, a right which could not be exercised during the war, were not " creditors " entitled in the distribution of the assets and their accounts were not unsecured " debts " of the bank.

In re Dieckmann [1918] 1 Ch. 33 applied.

Held, further, that " enemies " within the Act means persons or bodies which are enemies at the date of the winding-up order.

In re Deutsche Bank [1921] 2 Ch. 30 followed.

ADJOURNED SUMMONS.

The Banca Commerciale Italiana carried on a banking

SIMONDS J.

1942

BANCA COMMERCIALE ITALIANA, *In re.*

business in London, its head office being in Milan. On June 10, 1940, war broke out between England and Italy. On September 25, 1940, the Board of Trade made an order under s. 3A, sub-s. 1 (*b*), of the Trading with the Enemy Act, 1939 (1), that the business of the bank should be wound up; that Mr. Russell Kettle, chartered accountant, be appointed to control and supervise the carrying out of the order; and that, as controller, he should have various wide powers, including power, with the sanction of the Board of Trade, to pay any classes of creditors in full. In the course of its business the bank opened for customers what were called "lire accounts." Such an account was opened by the customer requesting the bank to open a current or a deposit account at the London branch in his name and either paying in a cheque or draft payable in lire and requesting the bank to remit lire to the bank's head office or some other Italian branch or paying sterling or other currency by cheque or draft into the bank to be sold for him for its equivalent in lire which would then be credited to him. A customer who opened such an account with the English branch had no right to draw cheques on the account or to obtain any payment in sterling or currency notes. His only right to operate on the account was by requesting the English branch to draw on the head office or a branch, i.e., by purchasing in England a lire draft payable in Italy or by requesting the English branch to make a telegraphic or mail transfer to an account in Italy. The present summons was taken out by the controller to determine (1.) whether he ought to admit the claims of customers with accounts in "lire" currency, either "old "lire" or "free lire," as being creditors in the winding-up of the bank entitled in the distribution of the assets; (2.) whether the amounts standing to their credit in lire were "debts" within the Trading with the Enemy Act, 1939; (3.) whether there was any priority for "free lire" over "old lire"; and (4.) at what date the enemy character of any enemy ought to be ascertained. Simonds J. held that no difference existed for the purpose of the present case between "old lire," dating from before 1935, and "free lire."

---

(1) By Defence (Trading with the Enemy) Regulations (St. R. & O., 1940, No. 1092), reg. 1 (3.): "In these regulations 'the principal Act' means the Trading "with the Enemy Act, 1939."

By St. R. & O., 1940, No. 1289: "After s. 3 of the principal Act "there shall be inserted the following section: 3A, sub-s. 1: Where "any business is being carried on "in the United Kingdom by, or on "behalf of, or under the direction "of, persons all or any of whom "are enemies or enemy subjects "or appear to the Board of Trade "to be associated with enemies, "the Board may, if they think "it expedient so to do, make ". . . . (*b*) an order (hereinafter "in this section referred to as a "'winding-up order') requiring "the business to be wound up. "Sub-s. 2: Where an order under "sub-s. 1 of this section is made "as respects any business, the "Board of Trade may, by that or "a subsequent order, appoint a "controller to control and supervise the carrying out of the "order, and in the case of a "winding-up order, to conduct "the winding up of the business, "and may confer on the controller "any such powers in relation to "the business as are exercisable "by a liquidator in the voluntary "winding up of a company . . . . "Sub-s. 3: Where a restriction "order or a winding-up order is "made as respects any business, "the distribution of any assets of "the business which are distributed while the order is in force "shall be subject to the same "rules as to preferential payments "as are applicable to the distribution of the assets of a company which is being wound up, "and the said assets of the business "shall, so far as they are available "for discharging unsecured debts, "be applied in discharging unsecured debts due to creditors of "the business who are not enemies "in priority to unsecured debts "due to any other creditors, and "any balance, after providing for "the discharge of all liabilities of "the business, shall be distributed "among the persons interested in "the business in such manner as "the Board of Trade may direct. "Provided that the provisions of "this sub-section shall, in their "application to the distribution of "any money or other property "which would in accordance with "those provisions, fall to be paid "or distributed to an enemy, "whether as a creditor or otherwise, have effect subject to the "provisions of s. 7 of this Act "(which relates to the collection "of enemy debts and the custody "of enemy property) and of any "order made under that section."

Wynn Parry K.C. and *Gedge* for the controller. The balances of "lire accounts" are not debts which the controller ought to admit. They do not come within s. 3A, sub-s. 3, of the Trading with the Enemy Act, 1939, the only debts contemplated by which are debts "presently payable": *In re Dieckmann* (1), decided under s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916, which corresponded to s. 3A, sub-s. 3, of the Act of 1939. These debts do not come within that description, and no customer of the bank is a creditor for them. The obligations of the bank cannot be turned into sterling. A customer whose only right was to be paid in foreign currency abroad is not a "creditor"

(1) [1918] 1 Ch. 331.

within the Act at all. The date for ascertaining enemy status is that of the distribution of the assets.

Pascoe Hayward for Morice, Tozer & Beck, Ld., non-enemy unsecured holders of Italian currency ("old lire"). The contract between this company and the bank was frustrated by the outbreak of war with Italy, and there is, therefore, a right to recover the funds provided by the company for the contract: *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ld.* (1). The material date to ascertain the value of a claim is the date when the contract was frustrated, i.e., the outbreak of war. Even if this is not a debt, it is, at any rate, a liability within the section for which the controller is bound to make provision.

Fawell for the Victory Insurance Co., Ld., non-enemy holders of Italian currency ("free lire"). I adopt *Hayward's* argument. These claimants were not creditors of the bank before the war with Italy. They could not demand payment in this country either of lire or sterling. The effect of their contract with the bank was that the bank became bailees of a sum of money in Italian currency which they were bound to deliver in a certain manner in Italy. There is, however, no such condition known to the law as the suspension of an express contract. A contract may be performed, or broken, or frustrated by becoming impossible or illegal of performance, but it cannot be merely suspended. It is clear that here the contract could not be performed, and it is immaterial whether it be broken or frustrated. English law recognizes debts in foreign currency and provides for payment in sterling when the debt falls due and where a contract is broken and the breach involves the ascertainment of damages in foreign currency that amount must be converted into sterling at the rate current at the date of the breach: *S.S. Celia* v. *S.S. Volturno* (2); *Madeleine Vionnet & Cie* v. *Wills* (3). Where there is a contractual relationship which involves that A has foreign currency on behalf of B, that is a motive for which a suit would lie in this court whether it be expressed as a debt or as an obligation to deliver at a particular date.

Lindner for the controller of the Yokohama Specie Bank, holders of sterling credits. These transactions, which involve the relation of banker and customer, do not come within the Trading with the Enemy Act, 1939. The bank was bound

(1) (1942) 58 T. L. R. 308.

(2) [1921] 2 A. C. 544.

(3) [1940] 1 K. B. 72.

to render certain services to property situated in Italy, and the doctrine of frustration cannot be applied to destroy a proprietary right. " There is, indeed, no such general proposition "as that a state of war avoids all contracts between subjects "and enemies" : per Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1). The relation of banker and customer does not involve any intercourse with the enemy. It is said that, if the contractual nexus is permitted to exist, it benefits the enemy, but any benefit to the enemy arises from their having the lire, and that is due, not to frustration or suspension of the contract, but to the fact of war. There can be no bailment of anything but chattels. What is known as " old lire " can only be used for certain purposes and they cannot be turned into sterling. " Free lire " are not limited in the same way.

Scott Cairns for Henri Frei, a Swiss depositor of sterling. I am in the same interest on the first question as Yokohama Bank and my interest is to defeat the other claimants. The bank is in no sense a trustee for the customer. The customer does not own anything in the bank and the arguments put forward by the claimants involve the fallacy that he does. [He referred to *Foley* v. *Hill* (2); *Joachimson* v. *Swiss Bank Corporation* (3).] There is here no frustration in law. If a contract is beneficial to the enemy it is dissolved by the declaration of war and the doctrine of frustration need not be called in aid: *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (4). But, if the contract is not beneficial to the enemy and does not involve intercourse with him, it is neither dissolved nor frustrated: *Halsey* v. *Lowenfeld* (5). This contract is not beneficial to the enemy. Nothing that the court can do can deprive the bank of the benefit it obtained from the use of the money before the war, but at the present time there can be no question of transferring money from the English branch to Italy. The only question is whether a customer in London could get money from Italy through the bank. The date for the determination of enemy status is that on which payment is to be made, and not that of the winding-up order. *In re Deutsche Bank* (6) should not be followed. It was decided under a different Act (the Trading with the Enemy Amendment Act, 1916), and in different circumstances. The Act of 1916 was permanent legislation,

(1) [1918] A. C. 260, 269.
(2) (1848) 2 H. L. C. 28.
(3) [1921] 3 K. B. 110.
(4) [1942] A. C. 154, 183.
(5) [1916] 2 K. B. 707, 716.
(6) [1921] 2 Ch. 30.

while the present Act is only temporary legislation, and will lapse when the Emergency Powers (Defence) Act, 1939, lapses: see s. 11 of that Act. *In re Deutsche Bank* (1) was decided after the war of 1914–1918 was over. During that war there was no legislation corresponding to s. 2, sub-s. 2, of the Trading with the Enemy Act, 1939. If the date of the order is the critical date, a British subject who was then in enemy territory, but escaped before the distribution will not be able to share in the distribution, but a creditor in a country which declared war against Britain shortly before the distribution would so share. The language of s. 3A is throughout more consistent with the test being made at the time of payment: see especially the proviso to sub-s. 3.

Lindner (on the last question raised by the summons): The date for the determination of enemy status is that of the winding-up order: *In re Deutsche Bank* (1), which is indistinguishable from the present case, should be followed. That s. 3A, sub-s. 3, of the Trading with the Enemy Act, 1939, is temporary legislation is immaterial, for a limitation on the duration of a statute does not affect its present force and validity. Nor is the question of principle determined in *In re Deutsche Bank* (1) affected by the fact that the case was decided after the last war was over, for questions of convenience are not relevant in construing a statute. In any event, such anomalies as arise result from changes of status rather than from the fixing of a particular date or dates for the determination of status. If on each distribution there must be a fresh determination of status the number of anomalies would be correspondingly increased, and fresh questions would arise on each distribution. The language of s. 3A, sub-s. 3, is for practical purposes identical with that of s. 3, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916.

Wynn Parry K.C. replied.

Cur. adv. vult.

SIMONDS J. Morice, Tozer & Beck, Ld., and the Victory Insurance Co., Ld., to whom I will refer as the claimants, claim to be "creditors" to whom "unsecured debts" are due within the meaning of s. 3A, sub-s. 3, of the Act. They say that they provided sums of lire in London on the terms that the bank would in effect provide them with lire in Italy; that the intervention of war made performance by the bank

(1) [1921] 2 Ch. 30.

SIMONDS J.

1942

Banca Commerciale Italiana, *In re.*

of its part of the bargain impossible, and that there has, therefore, been total failure of the consideration and they are entitled to have their lire returned to them. Since, however, they could not recover judgment in terms of lire, there must, they say, be conversion of lire into pounds sterling at the proper rate of exchange, which should be the rate of 71.25 lire to the pound, and for the sum so ascertained in pounds sterling they claim to be "creditors" within the meaning of the sub-section. They call in aid the recent judgment of the House of Lords, in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ld.* (1), which reversed the so-called rule in *Chandler* v. *Webster* (2), saying that here, too, there has been a "frustration" of the contract, and that, so far from the loss lying where, under the former rule, it lay, they are now entitled to have made up to them in sterling the sum that they provided in lire. This argument suggests many interesting problems, of which I do not think it necessary to attempt a solution—for example, whether there has been such failure of consideration as to support an action for money had and received; whether the doctrine of frustration of contract, with its incidents, strictly applies to a contract which is dissolved by the outbreak of war between the countries of the contracting parties; and, in particular, what is the effect of the reversal of the rule in *Chandler* v. *Webster* (2), where it has become illegal for the party who claims to be aggrieved himself to demand or accept performance of the contract. I can dispose more shortly of the issues raised in the present case.

In the consideration of s. 3A, sub-s. 3, of the Act of 1939, I have the advantage of a number of decisions on the corresponding sub-section of the Act which was its prototype, namely, s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916. I refer to, among others, *In re Kastner & Co.* (3); *In re Dieckmann* (4); and *In re Francke & Rasch* (5). I must give to the words "debts" and "creditors" in the later Act the meaning which was given to them in the earlier Act, and from the authorities I have mentioned it is clear that those words cannot be extended to cover claims which, even if they may eventually prove to be well-founded, could only be established if the claimants, having first overcome the procedural difficulties of suing, could then make good their

(1) 58 T. L. R. 308.

(2) [1904] 1 K. B. 493.

(3) [1917] 1 Ch. 390.

(4) [1918] 1 Ch. 331.

(5) [1918] 1 Ch. 470.

SIMONDS J.
1942
BANCA COMMERCIALE ITALIANA, *In re.*

claim. It is not, in my judgment, consistent with the earlier decisions nor, apart from those decisions, a fair interpretation of the section to regard such a claimant as an unsecured creditor or such a claim as a debt within its meaning. This shortly disposes of the first question in the summons, and I direct the applicant not to admit as unsecured debts due to creditors of the business who are not enemies the several so-called debts referred to in that question.

Questions 2 and 3 do not arise. Question 4 raises the point, what is the relevant date for ascertaining who were enemies. The same question arose on the earlier Act to which I have referred, and in *In re Deutsche Bank* (1) Russell J. decided that the relevant date was the date of the winding-up order. With, as I presume, that knowledge, the legislature enacted the present Act. It was forcibly argued that there exist differences between the earlier and the later Act which would justify me in adopting a different date, but I am unable to find any such differences. I do not think that I would have come to a different conclusion if the matter had been res integra. I am clear that I cannot do so where the legislature has re-enacted with such trifling differences a section to which judicial interpretation had been given. I, accordingly, decide that the relevant date for determining enemy or non-enemy character of a creditor is the date of the winding-up order.

Solicitors for all parties: *Slaughter & May.*

H. L. L.

(1) [1921] 2 Ch. 30.

In re KING.

BARCLAYS BANK, LIMITED *v.* KING.

C. A.
1942
May 11, 12; *July* 1.

Will — Construction — Devise of realty " duty free "—Freedom from legacy duty on sum applied in paying estate duty and succession duty—Some gifts of real and personal property to beneficiary free of duty and others not so—Additional devise in codicil silent as to duty—Freedom from duty of devise in codicil—Direction to pay "all duties payable in respect of my estate"—Limitation to gifts made expressly free of duty.

A direction by a testator in his will that a devise of realty should be " duty free " made the devise free, not only of succession duty and estate duty, but also of the legacy duty on the sums applied in paying those duties.

When under his will the testator made a number of gifts of real and personal estate entirely different in character to a beneficiary and expressly provided that some should be free of duty and others not so, an additional devise to the same beneficiary in a codicil with no mention of the duty thereon could not be treated as free of duty. In such a case it is impossible to apply the rule of construction that when a testator by his will gives a legacy free of duty and by codicil gives what is described as an additional legacy with no mention of duty, the additional legacy is subject to the same provisions as the original legacy, and, therefore, is also free of duty.

Where by his will the testator devised and bequeathed a number of specific devises and bequests some free of duty and others silent as to duty, a subsequent general direction to pay "all "duties payable in respect of my estate" out of the residuary estate will not relieve those devises and bequests not expressly given free of duty from the burden of bearing their own duties.

APPEAL from Simonds J.

By his will dated April 7, 1934, the testator, Edwin John King, appointed Barclays Bank, Ld., to be the executors and trustees of his will. By cl. 3 he gave a number of legacies and annuities "duty free." By para. 1 of the clause: "I "devise to my wife, Anna Maria King, my freehold house and "estate, Pashley, Ticehurst, Sussex, and I bequeath to her "10,000*l*., as also all the mortgages I hold on property "belonging to her at Lambourn, Berkshire." By cl. 4 the testator bequeathed "free of duty" to his daughters, Vera Nowell King and Iris Nowell King, absolutely certain personal chattels described as being in and about his dwelling-house, The Cedars, Chislehurst, at the time of his death, and by cl. 5 he gave to his daughter, Iris Nowell King, "free of all duty" certain advowsons and rights of patronage there specified. By cl. 6 he devised "free of duties" to his two daughters as joint tenants freehold premises known as The Cedars, and 16 Lubbock Road, Chislehurst, and 15 Green Lane, Chislehurst. By cl. 7 the testator devised to the bank his freehold land and hereditaments and premises known as Danemore Park, Speldhurst, Kent, with cottages and land, on trust to permit his wife, Anna Maria King, to have the use and enjoyment thereof during her life, and he directed the bank to invest the sum of 40,000*l*. and to pay the income arising therefrom to his wife for the upkeep of the premises. The testator also bequeathed the use and enjoyment of all his furniture and household and domestic effects and all his motor-cars, horses, carriages, harness, saddlery and stable furniture, and all plants and garden tools and implements and farming materials and stock which might be in and about Danemore Park at the time of his death to his wife during her life so long as she resided there, and he declared that from and after her death the same should fall into his residuary estate. From and after the death of his wife, or in the event of her not desiring to reside there, he gave and bequeathed Danemore Park with certain other freehold land "free of duty "unto the National Trust for the benefit of the nation." The testator also directed the bank to sell the securities representing the 40,000*l.* thereinbefore mentioned and out of the proceeds to pay to the National Trust 10,000*l.* free of duty, and that the residue of the proceeds of the sale should fall into and form part of his residuary estate. By cl. 8 the testator devised, appointed, and bequeathed all the real and personal estate not thereby otherwise disposed of to which at his death he should be beneficially entitled, or of which he should have power to dispose beneficially by appointment or otherwise (all of which and the investments for the time being representing the same were thereinafter called "my trust property"), to the bank on trust to hold and deal therewith according to the directions thereinafter contained. By cl. 9 the testator provided that the bank should as soon as practicable after his death sell, call in, and convert into money all such parts of his trust property as should not consist of money and should out of "my trust property pay my funeral and testa-"mentary expenses and debts and the pecuniary legacies "hereby bequeathed and all duties payable in respect of my "estate and shall invest the clear residue thereof hereinafter "called my residuary estate" as directed. By cl. 10 the testator directed the bank to pay one-fourth of the net income of his residuary estate to his wife during her life and that on her death a one-fourth share of his residuary estate should go to his stepson, Sir Hugh Nugent, absolutely, but, if he should predecease the testator's wife, that one-fourth share should be held in trust for Sir Hugh Nugent's children in equal shares, and should there be only one in trust for that one absolutely. The remaining three-fourths of the residuary estate were settled separately on the testator's son, Bullard Nowell King, and his two daughters and their children. The first codicil to the will dated May 18, 1934, recited that the testator had

C. A.
1942
KING, *In re.*
BARCLAYS BANK, LD. *v.* KING.

by his will made certain bequests to and provisions for his wife, Anna Maria King, and proceeded: "Now in addition thereto "I devise and bequeath my freehold messuage and dwelling "house known as Shirley Hall"—of which a description was set out—"to my trustees upon trust for my said wife "absolutely." The testator also released Sir Hugh Nugent from all sums of money advanced or which might thereafter be advanced to him by the testator, whether for principal or interest, and which might at the testator's death be owing by Sir Hugh Nugent to the testator. By a second codicil the testator, after reciting the provisions contained in cl. 7 of his will in favour of the National Trust, including the provision with regard to the payment to the National Trust of the sum of 10,000*l.* free of duty, stated that in view of the heavy extra duties that had since the date of his will been imposed on deceased's estates he revoked all the provisions in favour of the National Trust but in all other respects confirmed his will and the first codicil thereto.

A number of questions arose with regard to the incidence of the various duties payable in respect of certain of the dispositions made by the testator's will and the first codicil thereto, and an originating summons was taken out to determine those questions. The summons came before Simonds J. and he decided, among other things, that: (*a*) the burden of the legacy duty on the amount applied in payment of the estate duty and succession duty in respect of the devise of Pashley, Ticehurst, fell on the testator's widow; (*b*) the burden of estate duty and succession duty payable in respect of Shirley Hall and the property devised and bequeathed therewith by the first codicil fell on those properties; (*c*) the burden of the legacy duty payable on the amount applied in payment of the estate duty and succession duty in respect of The Cedars and 16 Lubbock Road and 15 Green Lane fell on the testator's daughters, Iris Nowell King and Vera Nowell King, as devisees thereof; (*d*) the burden of the estate duty payable in respect of Danemore Park and the premises devised therewith fell on those premises, and the burden of the succession duty payable in respect of the life interest of the testator's widow in the same premises fell on such life interest; (*e*) the burden of legacy duty payable in respect of the life interest of the testator's widow in the 40,000*l.* directed to be set aside and the income thereof paid to her for the upkeep of Danemore Park and the premises devised therewith fell on the income of that sum; (*f*) the release by the testator of the sums owing to him by Sir Hugh Nugent contained in the first codicil was not free of legacy duty; and (*g*) the legacy and succession duty payable in respect of (i.) the gift to the testator's widow during her life of one-fourth of the net income of the testator's residuary estate, (ii.) the gift to the testator's son, Bullard Nowell King, during his life of the net income of one-fourth share of the said residuary estate, (iii.) the gift to the testator's daughter, Vera Nowell King, during her life of the net income of another one-fourth share of the residuary estate, and (iv.) the gift to the testator's daughter, Iris Nowell King, of the net income of the remaining one-fourth share of the residuary estate ought to be paid out of the income of the respective shares of the residuary estate to which those persons were respectively entitled. The persons affected by these decisions appealed, and asked that in each of the cases specified under the headings (*a*), (*b*), (*c*), (*d*) and (*e*) the duty in question should be paid out of the testator's general estate, and that in the cases specified under heading (*g*) (i.), (ii.), (iii.) and (iv.) the duty should be paid out of the corpus of the shares mentioned in those headings. Sir Hugh Nugent cross-appealed in respect of the decision specified under the heading (*f*), and asked for a declaration that the release therein mentioned was free of legacy duty.

Gray K.C. and *Mulligan* for the testator's widow and children. An added or substituted legacy is payable subject to the same incidents as the original legacy: Hawkins on Wills, 2nd ed., p. 358. This principle applies to Shirley Hall which is devised to the testator's widow by the first codicil as a gift additional to the property given her in the will. Therefore, Shirley Hall, like the property Pashley, Ticehurst, given by the will, is devised duty free. It is true that some of the gifts to the widow in the will are not made free of duty, but when there is no such express provision the general direction in cl. 9 that "all duties payable in respect of my estate" should be paid out of residue makes all previous gifts in the will free of duty, whether in making the gift this is expressly provided or not. The testator is directing payment of any duty whatsoever which is payable in respect of his estate: see *In re Briggs* (1). Again, when property is given free of duty, the amount required to pay the estate duty and succession

(1) [1914] 2 Ch. 413.

duty in respect of that property is a legacy and the direction to pay free of duty applies to this legacy duty: *In re Turnbull* (1). Under the Legacy Duty Act, 1796, s. 21, a sum employed in paying legacy duty is expressly exempted from paying further legacy duty, but there is no similar provision in regard to the sum used in paying estate duty and succession duty. The testator's intention in making gifts free of duty, however, is that the gifts should suffer no deduction in respect of any duty.

H. A. Rose for Sir Hugh Nugent. The release by the testator of the sum due to him from Sir Hugh Nugent is, as in every other case when the gift is not made expressly free of duty, covered by the general direction in cl. 9, that "all duties "payable in respect of my estate" should be borne by residue.

G. D. Johnston for infants interested in residue. Under the Succession Duty Act, 1853, s. 42, succession duty is a first charge on the interest of the succession and under the Finance Act, 1894, estate duty on realty is a direct charge on the property. With this in view, "estate" in the direction in cl. 9 of the will means property passing to the executor as such. If the words "all duties payable in respect of my estate" are applicable to all property, real and personal, otherwise disposed of, the express provision as to certain gifts and not others, that they are to be free of duty becomes ridiculous. The words should not be extended to include any duty in respect of any dispositions under the will.

J. A. Reid for the trustees.

Gray K.C. replied.

Cur. adv. vult.

1942. July 1. LUXMOORE L.J. read the judgment of the court (LORD GREENE M.R., LUXMOORE and GODDARD L.JJ.). We propose to deal with the questions raised in the order in which they are stated. Para. (*a*) raises the question whether legacy duty is payable on the amount applied in payment of estate duty and succession duty in respect of Pashley, Ticehurst. It is admitted that the direction at the beginning of cl. 3 of the will that the benefits given by that clause are to be duty free exonerates the widow from all liability for estate duty, succession duty and legacy duty. It is also admitted that all sums required to comply with such direction must be treated as additional legacies. There is no direction

---

(1) [1905] 1 Ch. 726.

C. A.
1942
King,
In re.
Barclays
Bank, Ld.
v.
King.

directly dealing with these sums. In s. 21 of the Legacy Duty Act, 1796, however, there is an express provision that money left to pay legacy duty is not to be charged as a legacy. There is no such provision in the appropriate Finance Acts or the Succession Duty Act, 1853, but, since the amounts required to meet the last mentioned payments are to be treated as legacies, in addition to the beneficial gifts which are directed to be free of duty, it seems to us to be reasonably clear that the testator's intention, in using the words "duty free" was to provide that those gifts were to be enjoyed in toto and without any liability being cast on the beneficiary to pay any duty in respect thereof whether such duty should arise in respect of the subject-matter of the gift or in respect of the sums of money required to pay the duties thereon. This conclusion also covers the question raised under para. (*c*). We think that Simonds J. was in error in placing the liability to pay legacy duty on the amounts required to pay the duties referred to in paras. (*a*) and (*c*) on the respective beneficiaries, and, so far as these paragraphs are concerned, we think the order made by him should be varied.

Paragraph (*b*) raises the question whether Shirley Hall and the property devised and bequeathed with it by the first codicil is to be free from estate duty and succession duty. The codicil which contains the gifts is silent with regard to the duty in respect of these gifts, and it was argued that, as the gift was referred to as an additional gift, the case fell within the well-settled rule that where a testator gives a legacy by will and by a codicil gives to the same legatee what is expressed to be an additional legacy then the additional legacy is subject to the same provisions as the original legacy. In the present case the legatee takes under the will a number of benefits which differ entirely in character, while in some cases the benefits are expressly declared to be free of duty and in others they are not. In these circumstances it is impossible to apply the rule, and, in our judgment, this argument fails.

Reliance was placed on an alternative argument based on the provisions of cl. 9 of the will, directing that "all duties "payable in respect of my estate" should be paid out of the proceeds of sale and conversion of what the testator had defined as "my trust property," i.e., the real and personal property not specifically disposed of. It is difficult to read this as being intended to free all the specific gifts and legacies from liability

C. A.
1942
KING, *In re.*
BARCLAYS BANK LD., *v.* KING.

to duty, where, as in this case, the testator has expressly freed some of his gifts from duty and has not done so in other cases. In cl. 7, for instance, the testator is silent as to the incidence of duty in respect of the benefits given to the wife in Danemore Park and the other properties included therewith as well as in the income of the 40,000*l.* fund, while he expressly states that the benefits given to the National Trust in the same properties and the 40,000*l.* fund are to be free of duty. In our opinion, the question in the present case is: Ought the words in cl. 9, "all duties payable in respect of my estate," to be construed without regard to the fact that certain dispositions in the testator's will are in express terms given free of duty while other dispositions in the will and the first codicil are not expressed to be so given, or ought the words referred to to be construed having regard to that fact? If the former method of construction is correct, then every disposition taking effect at the testator's death would be freed from liability for duty although the testator has apparently in cl. 7 and in the first codicil treated some of his testamentary dispositions differently from others in respect of freedom from duty. In our view, the latter method of construction appears to be the safer, for it gives effect to the express directions of the testator and avoids treating the expressions with regard to the freedom of particular benefits from duty as being tautologous. For these reasons we think that Simonds J. was correct in holding that the burden of estate duty and succession duty payable in respect of Shirley Hall and the property devised and bequeathed therewith falls on the testator's widow. The same reasoning seems to us to apply with regard to the widow's interest in Danemore Park and the properties devised therewith, and to the income of the 40,000*l.* fund as well as to the release of the sums owing to the testator by Sir Hugh Nugent, and the life interests taken by the widow and the son and daughters of the testator in the respective fourth-shares of his residuary estate. We are, therefore, in agreement with the learned judge in respect of paragraphs (*b*), (*d*), (*e*), (*f*) and (*g*).

Order varied.

Solicitors for all parties: *Parker, Thomas & Co.*

H. C. G.

In re RUDD.

ROYAL EXCHANGE ASSURANCE *v.* BALLANTINE.

MORTON J.

1942

July 2.

Will—Administration—Executor—Right of retainer—" Debts owing to "personal representative in his own right "—Debt due to executor and another as trustees of a settlement—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 2.

The executor of a will, wishing to exercise his right of retainer in respect of a sum of 4000*l.*, owing by the testatrix to him and another person as trustees of a settlement out of which the sum was advanced, took out a summons to determine whether the right was exercisable as against other creditors of the estate. Neither the executor nor his co-trustee was beneficially entitled to any part of the sum advanced :—

Held, that the right which the executor sought to exercise was a right of retainer and not a right of preference (*In re Hubback* (1885) 29 Ch. D. 935, applied), but that he was not entitled to exercise that right of retainer, as s. 34, sub-s. 2, of the Administration of Estates Act, 1925, deprived a personal representative of the right, which he previously had, of retainer in respect of debts owing to him as a trustee.

ADJOURNED SUMMONS.

By her will, dated June 10, 1932, the testatrix, Edith Margaret Rudd, appointed her sister (who predeceased her) and Royal Exchange Assurance to be her executors. At her death, on June 7, 1940, 4000*l.* was owing to Royal Exchange Assurance and Thomas Ballantine in respect of an advance made to her out of funds in their hands as trustees of a deed of settlement dated September 30, 1903, on the security of a mortgage dated August 20, 1932. Neither trustee was beneficially entitled to that sum. A summons was taken out by Royal Exchange Assurance to ascertain whether they were entitled, as the legal personal representatives of the testatrix, to exercise the executor's right of retainer in respect of the 4000*l.* as against the other creditors of the estate.

L. R. Norris for Royal Exchange Assurance.

A. C. Nesbitt for Ballantine. Under s. 34, sub-s. 2, of the Administration of Estates Act, 1925 (1), the right of retainer is exercisable. The words "in his own right" in the sub-section should not be interpreted as bearing the restricted meaning of "in his own right beneficially." The phrase is used in contrast to a representative capacity, such as that of a trustee in bankruptcy or a liquidator. The principles generally applicable to cases of this kind were discussed by Sargant J. in *In re Harris* (1). [He also referred to *Sutton* v. *English and Colonial Produce Co.* (2); *Attorney-General* v. *Jackson* (3); and *In re Wester Wemyss* (4).]

---

(1) By s. 34, sub-s. 2, of the Administration of Estates Act, 1925 : " The right of retainer of a " personal representative and his " right to prefer creditors may be " exercised in respect of all assets " of the deceased, but the right of " retainer shall only apply to debts

Hillaby for other creditors. Sect. 34, sub-s. 2, alters the law as to retainer, for, whereas formerly the right of retainer could only be exercised in respect of legal assets, the section makes it exercisable in respect of all assets. To that extent an advantage has been conferred on the executor by the section, but the phrase "in his own right" in the sub-section has the restricted meaning of "in his own right beneficially," and the section thus deprives him of the right, which he formerly had, of retainer in respect of a debt due to him as a trustee. [He referred to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., p. 1462, and to *In re Hubback* (5).]

MORTON J. It seems to me plain that, if Royal Exchange Assurance exercised the right which they claim, they would be exercising a right of retainer and not a right of preference. If authority were needed for that proposition, it is to be found in *In re Hubback* (5), where it was held that: "One of several "executors is entitled to a right of retainer in respect of a "mortgage debt due from the testator to a body of trustees "of whom that executor is one." In that case 306*l.* 10*s.* was due to an executor and two other persons as trustees, and in giving judgment Cotton L.J. said (6): "It is established "that one of several executors, if a creditor, may retain, just "as if all were creditors, on this ground, that if one executor "is a creditor, as an executor cannot sue himself, there is "nobody who can sue, and he will therefore be placed at a "disadvantage if he cannot get that priority which another

---

" owing to the personal representative in his own right " whether solely or jointly with " another person. Subject as " aforesaid, nothing in this Act " affects the right of retainer of a " personal representative, or his " right to prefer creditors."

(1) [1914] 2 Ch. 395, 398.

(2) [1902] 2 Ch. 502.

(3) [1932] A. C. 365.

(4) [1940] Ch. 1.

(5) (1885) 29 Ch. D. 935.

(6) Ibid. 941.

"creditor by suing can get." It is clear that Cotton L.J. regarded the right which is now in dispute as a right of retainer and not as a right of preference, and that that is the true view of the matter is also supported by the language of s. 34, sub-s. 2, of the Administration of Estates Act, 1925, which indicates that, if a personal representative pays a debt owing to him jointly with another person, he is exercising a right of retainer and not a right of preference.

I must now consider whether Royal Exchange Assurance have the right which they claim. The question turns on the meaning which I ought to attach to the words: "owing to "the personal representative in his own right, whether solely "or jointly with another person." In the present case the debt is owing to the personal representative jointly with another person in the capacity of trustees. Mr. Nesbitt has contended that "in his own right" does not imply that the personal representative must be the beneficial owner of the debt, but merely that it must not be owing to him in such a representative capacity as that, for instance, of a trustee in bankruptcy or a liquidator. Mr. Hillaby, for other creditors, contends that the words "in his own right" imply beneficial ownership of the debt by the personal representative. Before this section came into force the right of retainer could be exercised in respect of legal but not in respect of equitable assets, and, further, it was well established by *In re Hubback* (1) and other authorities that an executor could retain in respect of a debt owing to him as a trustee whether solely or jointly with another person. Mr. Nesbitt has pointed out that in certain cases, and in particular in *Sutton* v. *English and Colonial Produce Co.* (2), the words "in his own right" have not been construed as meaning "beneficially," but even in that case it was pointed out that the words may have different meanings in different contexts.

I have arrived at the conclusion that, on the true construction of this sub-section and having regard to the context, the words "in his own right" mean "beneficially," and I think that that view is strongly supported by other language of the sub-section. It begins: "The right of retainer of a personal "representative . . . . may be exercised in respect of all "assets of the deceased." That gives to the personal representative an advantage which, until this section came into operation, he did not possess as he could only exercise his

---

(1) 29 Ch. D. 935.

(2) [1902] 2 Ch. 502, 507.

MORTON J.
1942
RUDD, *In re.*
ROYAL EXCHANGE ASSURANCE *v.* BALLANTINE.

right of retainer in respect of legal assets. Then comes the word "but," and the antithesis would seem apt to introduce something which, instead of giving an advantage to the personal representative, imposes some disadvantage on him. The sub-section continues: "but the right or retainer shall "only apply to debts owing to the personal representative in "his own right whether solely or jointly with another person." In my view, that part of the sub-section takes away from the personal representative the right of retainer which he formerly possessed in respect of debts owing to him as a trustee. It is pointed out that, if I put that construction on the words, I am deciding that this section has made a very striking change in the law. That is quite true, but I think that the concluding words of the section are a strong indication that the section does make that change. The words are: "Subject as afore-"said, nothing in this Act affects the right of retainer of a "personal representative, or his right to prefer creditors." There, it seems to me, the legislature is saying in effect that what has gone before has affected the right of retainer or the right to prefer, but that these rights are not to be affected in any other way. For these reasons I propose to answer the question in the negative.

Solicitors: *Peacock & Goddard, for Mooring Aldridge & Haydon, Bournemouth.*

J. L. D.

FARWELL J.
1942
July 15.

In re LEWIS.

GORONWY *v.* RICHARDS.

Will—Construction—Residue to X "and/or" Y—Joint tenancy.

A testator, by his will, gave his residue to his wife for life and, in the event of her predeceasing him, then, after his death "all" to X "and/or" Y. His wife predeceased him:—

Held, that the testator's intention was that X and Y should take the residue as joint tenants, but, *semble*, if X had not survived the testator, the gift to Y would have taken effect in substitution for the joint gift.

ADJOURNED SUMMONS.

By his will, dated August 9, 1941, David Lewis, after giving

FARWELL J.
1942
LEWIS, *In re.*
GORONWY *v.* RICHARDS.

certain pecuniary legacies, gave his residue to his wife for life, and, in the event of her predeceasing him, then, after his death, he gave "all to Margaret Ann and/or John Richards." The testator's wife died on October 28, 1941, and the testator died on December 28, 1941. This summons was taken out by one of the executors of the will to determine whether the residuary bequest operated as a gift to Margaret Ann Richards and her husband, John Richards, or how otherwise it operated, or whether it was void for uncertainty.

Harold King for the executor.

Rose for Margaret Ann Richards. The gift is to the wife or husband, and, in reliance on *Sherratt* v. *Bentley* (1), the court could reject the compound expression "and/or," which is inconsistent with the general intention of the will, and read it as "or." In that case the wife would take absolutely, substitution having failed. Alternatively, the gift is to the husband and wife jointly, with a gift to the husband if the wife predeceases the testator.

Reid for John Richards. The gift constitutes a joint tenancy. [He referred to *In re Sibley's Trusts* (2) and *In re Goods of Bradford* (3).]

Danckwerts for the Treasury Solicitor. A grant to A or B is void. Therefore, this gift is void for uncertainty. [He referred to *Longmore* v. *Broom* (4), and to Jarman on Wills, 7th ed., vol. i., p. 450.]

FARWELL J. The question which I have to decide is the effect of a gift to "Margaret Ann and/or John Richards." It may be an absolute gift to Margaret Ann, and, if she does not survive the testator, then to John Richards, or it may be a gift to them jointly, or it may be wholly void. Mr. Danckwerts has submitted that the gift is void for uncertainty. I should not construe the words in that way unless I was satisfied that they were incapable of having any certain meaning. The expression "and/or" is unfortunate. I do not think I have met it before in a will, and I hope I shall never meet it again. I have, however, to put a meaning on it, if possible. Several cases have been cited which I do not think assist me. I have come to the conclusion that this gift is not void for uncertainty. I think that the testator

(1) (1833) 2 My. & K. 149.
(2) (1877) 5 Ch. D. 494.
(3) (1895) 72 L. T. 267.
(4) (1802) 7 Ves. 124.

FARWELL
J.
1942
LEWIS,
In re.
GORONWY
v.
RICHARDS.

meant that Margaret Ann and John Richards should take the residue as joint tenants, but that, if Margaret Ann did not survive the testator, the gift to John Richards was to take effect in substitution for the joint gift. In the events which have happened, the residue goes to them as joint tenants, and I make a declaration accordingly.

Solicitors: *John Page Thomas, for Thos. Williams & Owen, Pentre*; *Treasury Solicitor.*

J. L. D.

---

ferred to. *In re* WARING.
[1948] 1 Ch. 221

C. A.
1942
July 16.

In re WARING.

WESTMINSTER BANK, LIMITED *v.* AWDRY AND OTHERS.

Will — Annuities — " Free of income tax " — Rate of tax — Will dated before September 3, 1939—*Testator's death after that date—Finance Act*, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

Where annuities free of income tax have been bequeathed in a will signed and attested before September 3, 1939, but the testator dies after that date, the Finance Act, 1941, s. 25, sub-s. 1, applies, and, therefore, during any year in which the standard rate of income tax is ten shillings in the pound the bequest takes effect as if for the stated amount of each annuity there was substituted an amount equal to twenty twenty-ninths thereof. The fact that a codicil was made after September 3, 1939, which contained no reference to the annuities and no express confirmation of the will, did not cause the provision to be treated as made on the date of the codicil so as to make s. 25, sub-s. 1, inapplicable.

In re Elcom [1894] 1 Ch. 303 applied.

Decision of Farwell J., ante p. 309, reversed.

APPEAL from Farwell J. (1).

By his will, dated February 11, 1939, the testator, John Arkle Waring, bequeathed two annuities of 100*l.* each " free of "income tax." There was a subsequent gift of residue in which the defendant, Cater, was interested. By a codicil, dated March 8, 1939, the testator directed the trustees "to "set apart as soon as conveniently may be and invest in their "names . . . . a sum the income whereof when invested "shall be sufficient at the time of investment to pay the "annuities bequeathed by my said will . . . ." A second

---

(1) Ante p. 309.

C. A.

1942

WARING, *In re.*

WESTMINSTER BANK, LD. *v.* AWDRY.

codicil, dated January 27, 1940, which did not confirm the will, contained nothing material. The testator died on August 3, 1940. The executors of the will took out a summons to determine whether, in appropriating a fund to satisfy the annuities, such income should, having regard to s. 25, sub-s. 1, of the Finance Act, 1941 (1), suffice to pay twenty twenty-ninths only of the gross amount of the annuity, income tax being taken into account at ten shillings in the pound. Farwell J. held that the sub-section did not apply to a will made before September 3, 1939, by a testator who died after that date, and that the answer to the question raised by the summons was, therefore, in the negative. The defendant, Cater, appealed.

Roxburgh K.C. and *J. V. Nesbitt* for the defendant, Cater. A will is made when it is signed and attested and Simonds J. so decided in an unreported case. The very language of s. 25, sub-s. 1, shows that the provision in the will is made at the date when the will is signed, although it does not take effect till the testator dies and meanwhile it is ambulatory. It would be impossible for para. (*c*) of the sub-section ever to have any application to a will if the will is to be treated as made at the testator's death as no provision could be varied after that event. A testamentary provision must be " made " in the lifetime of the testator. If the sub-section had referred simply to the date when the will was made, it is unarguable that this would not be the date on which it was signed and attested : *In re Elcom* (2). In *In re Rayer* (3) the attention of the court cannot have been drawn to *In re Elcom* (2). Farwell J.'s decision was wrong on the construction of the section and on *In re Elcom* (2). The fact that the second codicil was signed after September 3, 1939, does not

---

(1) By Finance Act, 1941, s. 25, sub-s. 1 : " . . . . any provision, "however worded, for the payment, whether periodically or "otherwise, of a stated amount "free of income tax . . . . being "a provision which—(*a*) is contained in any deed or other "instrument, in any will or codicil, "in any order of any court, in "any local or personal Act, or in "any contract, whether oral or in "writing ; and (*b*) was made "before September 3, 1939 ; and "(*c*) has not been varied on or "after that date, shall, as respects "payments falling to be made "during any year of assessment, "the standard rate of income tax "for which is ten shillings in the "pound, have effect as if for the "stated amount there were substituted an amount equal to "twenty twenty-ninths thereof."

(2) [1894] 1 Ch. 303.

(3) [1903] 1 Ch. 685.

C. A.
1942
Waring,
In re.
Westminster
Bank, Ld.
v.
Awdry.

affect the matter. Admittedly, a codicil operates as a republication of the will without any express words of confirmation: *In re Smith* (1); but the doctrine of republication is not of general application. A provision in a will is not re-made by republication and in the present case nothing is said about the annuities in the second codicil. Further, the second codicil was made before the Finance Act, 1941, was passed, so that the republication could not be intended to affect the application of s. 25, sub-s. 1. When the Wills Act, 1837, provided by s. 34 that "every will . . . . republished . . . . "by any codicil, shall . . . . be deemed to have been made "at the time when the same shall be so . . . . republished," it clearly regarded a will as made when it was signed and attested. It is absurd to say that the bequest of annuities here was a provision made at the date of the second codicil. The provision was contained in the will and not in the codicil even though there was republication. [They referred to Jarman on Wills, 7th ed., vol. i., p. 186.]

Vaisey K.C. and *Mrs. Horne* for one of the annuitants. Sect. 25, sub-s. 1, of the Finance Act, 1941, refers to a provision (*a*) contained in a will or codicil, and (*b*) made before September 3, 1939, and (*c*) not varied on or after that date. It is not the will or codicil that has to be made before September 3, 1939, but the provision, and if the question is asked whether a provision has been made for a person by will, the answer must be that it is impossible to tell until the will is made effective by the testator's death. Sect. 25, sub-s. 1, is an omnibus sub-section applying to many different kinds of documents, and generally the provision is made at the date of the document, but by its language the sub-section is providing also for the case of a will or a codicil where this is not so. Hence the difference between the language used in s. 25, sub-s. 1, and that used in s. 26, sub-s. 1. Further, in construing s. 25, sub-s. 1, the court should bear in mind the fact that it interferes with the liberty of the subject and that should not be done to a greater extent than the language compels.

In considering whether s. 25, sub-s. 1, applies, the relevant date is that of the death of the testator: *Cooper* v. *Martin* (2). Moreover, the second codicil operated as a republication of the will, and, as that codicil was made after the tax had been greatly increased, it might well indicate that the testator had deliberately refrained from altering his will in spite of the higher rate of tax. The right view is that the provision in a will is made at the testator's death and that the reference in para. (*c*) of s. 25, sub-s. 1, to a variation of the instrument has no application in the case of a will.

---

(1) (1890) 45 Ch. D. 632.

(2) (1867) L. R. 3 Ch. 47.

J. A. Wolfe for the executors.

LORD GREENE M.R. Nearly a year after the testator's death, two and a half years after his will, and a year and a half after his second codicil, the legislature passed a piece of retrospective legislation. At the outbreak of war, the standard rate of income tax was five shillings and sixpence. It was raised almost immediately. For the year 1940–41 the final standard rate was eight shillings and sixpence, and for 1941–42 it was ten shillings. It was obvious that these increases in the standard rate of tax would have a very important effect on the provision in any document under which annual sums of money, such as annuities, were to be paid free of income tax, and the legislature took the view that it would be inequitable to leave the burden of war taxation to be borne by one party or set of parties to the transaction without any contribution from the party in receipt of the tax-free payment. In the case of a tax-free annuity given under a will the entire income of the estate might be swallowed up owing to the exceptional burden of war taxation, leaving nothing for the residuary legatees or for persons who were entitled subject to the annuity. The Finance Act, 1941, did not receive the Royal Assent until July 22, 1941, and it is, therefore, manifest that neither at the date of his will, nor at that of either of the codicils, nor at that of his death, did the testator know that legislation of this kind was going to be introduced. Nor did he know that income tax was ever going to reach ten shillings in the pound, the point at which the legislature would find it necessary to intervene. Had he known of those matters, he might have provided for them in his will.

Reading the language of s. 25, sub-s. 1, of the Finance Act, 1941, and remembering the mischief at which the Act was aimed, I should myself have felt no doubt that the section applied to the present case. Here is a provision for payment of a stated amount free of income tax. It is contained in a will. That will was made before September 3, 1939. I should have thought that the phrase " was made " referred in the case of a provision in a will, to the date when the will was executed and attested, although it did not become effective until death. Farwell J., however, held otherwise. He thought that the provision for these tax-free annuities was made at the date of the testator's death, and he arrived at his conclusion by pointing out that the provisions of a will do not take effect at an earlier date than death. That is true, but the section does not say: "A provision which came into effect before "September 3, 1939," but "a provision which . . . . was "made before September 3, 1939," and it is to be a provision contained in a document. The word "provision" is used as a general term which will cover the contents of any of the documents specified in para. (*a*). Similarly, the phrase "was "made" is intended to cover a provision in any of those documents. Just as a provision in a deed is made when the deed is executed and delivered, I should have thought that a provision in a will is made when the will is executed and witnessed. It is to be observed that when a testator executes his will he is expressing his intention just as the parties to a deed express their intention, and he knows that the document will have the effect which he intends if he dies the next moment just as much as if he does not die for ten years. Testators making their wills before September 3, 1939, would, ex hypothesi, do so with reference to a state of facts quite different from that for which s. 25 was drafted. If the argument for the annuitant were correct, it would mean that testators who died in the interval between September 3, 1939, and the date when the ten shillings income tax was imposed by the Finance Act, 1941, would, at their peril, have had to make new wills or codicils in contemplation of this exceptional rise in tax. It seems to me that the legislature cannot have imputed it to testators that they would make provision for subsequent legislation at the time when they made their wills. What happened was that, testators having made their wills, the legislature intervened and adjusted the burden between the classes of persons benefiting under the wills. I see no reason why the legislature should have dealt with the matter in the way in which the annuitant claims here, but I can see many excellent reasons why it should not. That makes it easier for me to accept what, in my view, is the clear prima facie meaning of this language.

Mr. Vaisey really founded his argument on the distinction which the section appears to draw between the date of the instrument and the date of the provision. He says that that distinction can only be a sensible one in the case of a will or a codicil. It seems to me that that is much too fine a distinction in the case of an omnibus clause of this kind, and I cannot see that there is any sound reason for it on any principle of construction. Mr. Vaisey also calls attention to s. 26 of the Act where no such distinction is drawn, but the whole framework of that section is different, and I cannot myself draw from its language any conclusion as to the intention of the legislature in s. 25, sub-s. 1. It seems to me that for some reason of convenience in drafting, s. 25 was framed so that the words "was made" are referable to the "provision" and not to the instrument, but I cannot extract from that the consequence for which Mr. Vaisey contends. Further, para. (*c*) of s. 25, sub-s. 1, requires that the "provision" for the tax-free payment shall not have been varied on or after September 3, 1939. If Mr. Vaisey's argument and the judgment of the learned judge were correct, that paragraph could have no application whatsoever to a provision by will because, if the provision can only be deemed to be made when the testator dies, it is quite obvious that it never can be varied after his death. That seems to me to be an additional confirmation of my view. I need not seek for further confirmation in sub-s. 5 (*b*). That, however, does make provision for cases where, in either an original will or a later codicil, a testator has done something to provide for the extra burden of taxation, and it seems to me that there the legislature is merely saving the case where the testator has himself done the sort of thing which the legislature would otherwise have done for him under s. 25, sub-s. 1. There seems to me to be very much more scope for the operation of such a provision in the case of wills and codicils made before September 3, 1939, than in that of those made afterwards, but I do not find it necessary to rely on this for the purpose of construing s. 25.

There is one other point which I should mention. The second codicil, which was made on January 27, 1940, that is to say, after September 3, 1939, did not confirm the will. It may be that where a codicil made after September 3, 1939, does confirm an earlier will different considerations arise, but all those questions can be dealt with if and when they arise and I express no opinion on them. It is sufficient to say that there is no confirmation of the will in the second codicil, and it is quite impossible to treat the provision made by the will as one which, for the purposes of this section, was made by the codicil. I am not sure to what extent Mr. Vaisey relied on the doctrine of republication of wills, but it seems to me that that doctrine has no application whatever to the present question. I do not propose to take up time in discussing that matter, but it is worth mentioning that in *In re Elcom* (1) this court had to deal with a rather similar matter arising under Malins' Act, which empowered a married woman, with the concurrence of her husband, to dispose, by deed acknowledged, of future or reversionary interests in personal estate to which she was entitled under any instrument made after December 31, 1857. Apart from the difference between the "provision" being made and the "instrument" being made, the language is practically the same as we have here. In that case the instrument under which the married woman became entitled was a will dated before December 31, 1857. After December 31, 1857, a codicil was made to the will, but that codicil did not affect the gift to the married woman save by reducing it as the result of increasing the amount of certain legacies. The argument was that on the true construction of the Act the married woman had become entitled to that reversionary interest under a will made after December 31, 1857, because, it was said, the will and the codicil together must be treated as the effective testamentary instrument, the whole operating as from the execution of the codicil. That was negatived, and Chitty J. (1) describes the effect of the Act in these terms: "The Act treats the date at which a testator's testamentary "dispositions come into operation by his death as immaterial. "Persons still living at the passing of the Act (August 25, "1857) who had already made their wills, and persons who "afterwards made their wills before or on December 31, 1857, "were in effect told that their wills would be left to operate, "in regard to married women, under the law as it stood at the "passing of the Act, that it was not necessary for them to "insert any restraint upon alienation in order to prevent the "married woman from disposing of her interest. In dealing "with the Act, I am bound to take the words as I find them, "and to construe them in their ordinary and natural sense. "I think the words refer to the particular instrument containing "the gift, which in this case is the will, and that this instrument "was made within the meaning of the Act at the time when it "was duly executed and attested as required by law." When the matter came up to the Court of Appeal, Lindley L.J. pointed out (2) that the testatrix did not in terms confirm

(1) [1894] 1 Ch. 303. (2) Ibid. 312.

her will which, he says, is quite immaterial. He continues: "How do you 'make' a testamentary instrument? By "signing it with such formalities as the law requires. Under "what instrument does Mrs. Hamilton derive her title? "Under the will, and the will was made before the Act." It was pointed out, too, that as the Act referred to an instrument, the codicil could not be brought into the picture by reason of the fact that wills and codicils must be read together. That seems to me to be sufficient to dispose of any argument based on the suggestion that for the purposes of the present question the material date must be that of the second codicil.

I am of opinion, therefore, that the appeal must be allowed.

MacKinnon L.J. I agree, and I think that this is a very plain case. If a provision for the making of periodical payments free of income tax is to be affected by s. 25, sub-s. 1, it must fulfil two conditions—first, that it is contained in one or other of the specified types of documents, and, secondly, that it was made before September 3, 1939. If the provision had been contained in any one of five of those specified types of document, namely, deed, instrument, order of court, local or personal Act, or contract in writing, it is manifest that the date of its making would be the date expressed in the instrument or, with regard to local or personal Acts, the date of the Royal Assent thereto. This provision arises under one of the other two specified types of document, will or codicil, and the sole question is whether the will in question was made before September 3, 1939. What is the date of the making of a will? By analogy with the other specified types of documents, I should have thought manifestly the date when the will is signed, for a will provides: "In witness "whereof I have set my hand on" such and such a day. In *In re Elcom* (1) Lindley L.J. asked: "How do you 'make' "a testamentary instrument?" He answered that question by saying: "By signing it with such formalities as the law "requires." That is what the testator did on February 11, 1939.

The only other authority, if it is necessary to have authority, is s. 34 of the Wills Act, 1837, because there also the legislature referred to the date of the making of a will in enacting that that Act should not extend to any will made before January 1,

(1) [1894] 1 Ch. 303, 312.

C. A.
1942
WARING, *In re.*
WESTMINSTER BANK, LD. *v.* AWDRY.
MacKinnon L.J

1838. What was the date on which a will was made within the meaning of that provision? I think quite clearly the date at the end of the will where the testator says: "In witness "whereof I have set my hand on" the date of signing the will. That section goes on to provide that every will re-executed or republished or revived by any codicil shall, for the purposes of that Act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived. I think it is plain in the present case that the will was made on February 11, 1939, and, therefore, before September 3, 1939, and that s. 25, sub-s. 1, does apply to the provision with which we have to deal.

LUXMOORE L.J. I agree.

Appeal allowed.

Solicitors: *Lee & Pembertons; Ouvry & Co.*

H. C. G.

FARWELL J.
1942
July 21.

In re CLARKE.

SHELDON *v.* REDRUP.

Will—Construction—Annuity—Direction to appropriate capital sum to meet annuity—Gift over of capital subject to annuity—Death of annuitant before testatrix—Effect on gift over.

A testatrix by her will made in 1932 bequeathed an annuity of ten shillings a week to her housekeeper for her life and directed her trustee to appropriate and invest a capital sum the income of which should be sufficient to provide for the annuity, but with recourse to capital if it should prove insufficient. Subject thereto the testatrix bequeathed the sum so appropriated to a charity. The annuitant died in December, 1936. In May, 1937, the testatrix made a codicil to her will, and thereby appointed a new executor in place of the one named who had died and in other respects confirmed her will, and died in 1941:—

Held that, although the gift of the annuity failed, and there was no need to appropriate any sum to meet it, the gift of an equivalent sum to the charity was effective.

ADJOURNED SUMMONS.

By her will made in 1930, the testatrix, Adeline Mary Clarke, after appointing two executors and trustees and making various specific and pecuniary bequests, provided by para. 7: "I bequeath free of duty an annuity of ten shillings "per week to my landlady, Mrs. Alice Mabel Clarke, for her "lifetime to commence from my death and to be considered "as accruing from day to day and I direct my trustees to "provide for the said annuity by setting apart and investing "in their names or under their control in any investments "which they may think fit a sum the income whereof when "invested shall be sufficient at the time of investment to "provide for the said annuity and to pay the same accordingly "with power to resort to the capital of the appropriated fund "whenever the income shall be insufficient and until such "sum shall be so appropriated I charge my residuary estate "with the said annuity but after such appropriation my "residuary estate shall be discharged from the said annuity. "Subject to the payment of the said annuity the appropriated "fund or so much thereof as shall not have been resorted to "to make up any deficiency of income shall upon the death "of the said Alice Mabel Clarke be paid to the Society for the "Propagation of the Gospel in Foreign Parts of Tufton Street "London. Any surplus income of the appropriated fund "shall be applied in the same manner as income of my "residuary estate." On December 25, 1936, the annuitant, Alice Mabel Clarke, died. On May 20, 1937, the testatrix made a codicil to her will substituting a new executor for one of the original executors who had died, but in all other respects confirming the will. In May, 1941, the testatrix died, the will and the codicil being duly proved. The question raised by this summons, which was taken out by one of the executors, was: What effect did the fact that the annuitant predeceased the testatrix have on the gift in cl. 7 of the will of the annuity of ten shillings to her, and the subsequent gift of the appropriated sum to the charity?

Pascoe Hayward for the residuary legatees. The gift to the charity fails because it was conditional on the appropriation of a fund to meet the payment of the annuity. It was only the residue of this fund which was given over and as no fund was appropriated, the gift fails altogether. If the estate had been deficient, and the annuitant had lived long enough, she might have received the whole of the capital provided for her annuity, and in that case the charity would have taken nothing at all.

J. V. Nesbitt for the charity. The testatrix clearly intended that the charity should get this capital sum subject to the payment of the annuity. The codicil executed after the annuitant died expressly confirms the gift. It is really a settled legacy. If the annuitant had survived the testatrix by only one day she and the charity would clearly have been entitled.

FARWELL J. It is curious that there is no authority on the matter which I have to decide. It is a question of construction of this will. I have felt very considerable doubt, and for some time I was much inclined to take the view that the fact of the annuitant not having survived the testatrix had the effect of defeating the whole clause, that is to say, that the provision as to appropriation of the fund was mere machinery for providing for the annuity, and as the annuity failed altogether, the machinery was unnecessary with the result that the gift to the charity failed. It has, however, been pointed out quite truly that, if the annuitant had survived the testatrix even by one hour, she would have been entitled to her annuity, and, though there would have been no longer any necessity to provide a capital sum the income of which would be sufficient to provide ten shillings a week for the purposes of the annuity, it could not then be said that the gift to the charity had been defeated. On the whole, therefore, I have come to the conclusion that the true effect of cl. 7 is that the testatrix intended the annuitant to have an annuity of ten shillings a week during her life and wished to provide for the payment of that annuity by directing the appropriation of a sum which would be sufficient to produce ten shillings a week, and that she desired that appropriated sum, when the annuitant died, to be paid over to the charity, subject to the provision that, if the income of the appropriated fund did not prove sufficient during the lifetime of the annuitant to pay the whole of the ten shillings a week, the capital of the appropriated fund should be resorted to, to which extent the gift to the charity would be decreased. In my view, the intention was that the charity should have the sum which by the will was directed to be appropriated and the death of the annuitant in the lifetime of the testatrix does not defeat the ultimate gift to the charity. That view is strengthened by the fact that the testatrix, at a time when the annuitant had been dead for some months, made a codicil by which she in terms confirmed her will. I have, therefore, come to the conclusion that it is the duty of the trustees to set aside a capital sum the income of which will be sufficient to provide ten shillings a week and to pay over the capital sum so appropriated to the charity: and I will make a declaration accordingly.

FARWELL J.
1942
CLARKE, *In re*
SHELDON *v.* REDRUP.

Solicitors: *Routh, Stacey, Hancock & Willis, for Thring, Sheldon & Ingram, Bath*; *Nicholl, Manisty & Co.*

H. L. L.

WORTHING CORPORATION *v.* SOUTHERN RAILWAY COMPANY.

C. A.
1942
July 13, 14, 31.

Rates — Railway — Amendment of current valuation list — Proposal made after end of first railway quinquennial period, but before completion of second valuation roll—Validity—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 18, *sub-s.* 3.

On April 27, 1934, the first railway valuation roll relating to the undertaking of the Southern Railway for the period April 1, 1931, to March 31, 1936, was completed under the Railway (Valuation for Rating) Act, 1930. W. station, part of which consisted of a coal wharf and office licensed to be used by coal merchants, was entered in that roll as a railway hereditament. The wharf premises and their value were duly entered in the valuation list kept by the borough of W. under the Rating and Valuation Act, 1925. On February 27, 1937, in consequence of the decision in *Westminster City Council* v. *Southern Ry. Co.* [1936] A. C. 511, that premises on a railway station let to or licensed to be used by tenants were not railway hereditaments, W. corporation presented a proposal under s. 37 of the Rating and Valuation Act, 1925, to the W. area assessment committee to amend the valuation list by separately assessing the wharf and office as not being a railway hereditament so as to enable the corporation to recover the general rate for the premises as from April 1, 1936, when the first railway roll expired. The second railway roll relating to the Southern Railway, which did not include the above premises as part of a railway hereditament, was completed in January, 1939, and took effect as from April 1, 1936, for the five years following:—

Held, by Lord Greene M.R. and Luxmoore L.J., MacKinnon L.J. dissenting, that in the interval between the expiry of one railway valuation roll and the completion of the next valuation roll the phrase "railway valuation roll" in s. 18, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, must be taken to refer to the

C. A.

1942

WORTHING CORPORATION v. SOUTHERN RY. CO.

roll that has expired, and as at the date when the proposal was made the premises in question were still for the time being shown on the first railway valuation roll as part of a railway hereditament, the proposal was ineffective and the assessment committee were not entitled to hear it.

Decision of Uthwatt J. ante p. 178 affirmed.

APPEAL from Uthwatt J. (1).

The plaintiffs, Worthing Corporation, took out a summons under R. S. C., O. LIV., r. 1 (*a*), asking whether on the true construction of the Rating and Valuation Act, 1925, and of the Railways (Valuation for Rating) Act, 1930, and in the events which had happened, a proposal made by them, dated February 22, 1937, to the Worthing area assessment committee to amend their valuation list by separately assessing a coal wharf and office at Worthing station belonging to the defendants, the Southern Railway Co., and licensed by them to be used by a firm of coal merchants, being part of the railway hereditament consisting of Worthing station and entered as such on the railway valuation roll prepared under the Act of 1930, was a valid and effective proposal, and, if so, whether they had a right to have it heard and determined by the Worthing area assessment committee and, on an amendment being made in the valuation list, to recover the general rate in respect of the premises in question current at the date and the rates in subsequent years.

The part of the first railway valuation roll made under the Railways (Valuation for Rating) Act, 1930, which related to the undertaking of the Southern Railway was completed on April 27, 1934, and took effect from April 1, 1931. In that roll the wharf and office, with other hereditaments occupied by the Southern Railway Co. in the borough of Worthing were included as railway hereditaments, a net annual value and a rateable value being attributed to them pursuant to s. 8 of the Act of 1930. In due course the hereditaments and the values so attributed to them were, in accordance with s. 12 of the Act of 1930, entered by the assessment committee on the valuation list for the borough of Worthing kept under the Rating and Valuation Act, 1925. On May 20, 1936, the House of Lords gave its decision in *Westminster City Council* v. *Southern Ry. Co.* (2), and on February 22, 1937, the plaintiffs, who were the rating authority for the borough of Worthing, anticipating that in the second railway valuation roll the coal

---

(1) Ante p. 178.

(2) [1936] A. C. 511.

C. A.
1942
WORTHING CORPORATION v. SOUTHERN RY. CO.

wharf would not, in view of that decision, appear as a railway hereditament occupied by the Southern Railway Co. and affecting to act under s. 37 of the Rating and Valuation Act, 1925, made a proposal for the amendment of the valuation list by the separate assessment of the coal wharf on the ground that it was not a railway hereditament. On January 27, 1939, the part of the second railway valuation roll which related to the undertaking of the Southern Railway Co. was completed, and in that roll the wharf and office did not appear as a railway hereditament. This part of the roll took effect for all purposes as from April 1, 1936: see s. 17 of the Act of 1930. No step directed to the hearing of the proposal was taken.

Uthwatt J. held that, as, at the date when the proposal was made, the premises in question were still shown in the railway valuation roll as part of a railway hereditament, the proposal was ineffective, and the assessment committee were not entitled to hear it. The phrase "railway valuation roll" in s. 18, sub-s. 3, of the Act of 1930 (1) meant the roll by virtue of which the hereditament appeared in the valuation list, and not the roll governing the quinquennium in the course of which the proposal was made. The plaintiffs appealed.

Turner K.C. and *Neep* for the plaintiffs. The decision of Uthwatt J. was wrong. In *Westminster City Council* v. *Southern Ry. Co.* (2) the House of Lords held that bookstalls, chemists' shops, kiosks, hairdressing saloons and other

---

(1) By Railways (Valuation for Rating) Act, 1930, s. 18, sub-s. 1: "As from the appointed day, a "rating authority in preparing a "draft valuation list or a new "valuation list under the Rating "and Valuation Acts, shall enter "therein in respect of any heredit-"ament for the time being shown "in the railway valuation roll as a "railway hereditament the values "and other particulars appearing "in respect of that hereditament "in the valuation list for the time "being in force, and while that "hereditament remains in the roll, "no amendment shall be made in "the values or particulars so "entered except in pursuance of "a notice sent to the assessment "committee by the Railway "Assessment Authority under the "provisions of this Act relating to "the notification to assessment "committees of values and of "alterations of values of railway "hereditaments."

By sub-s. 3: "The provisions "of the Rating and Valuation "Acts with respect to . . . . the "revision or amendment of cur-"rent valuation lists by means of "proposals, supplemental lists or "provisional lists . . . . shall not "apply in the case of a heredita-"ment for the time being shown in "the railway valuation roll as a "railway hereditament."

(2) [1936] A. C. 511.

C. A.

1942

WORTHING CORPORATION v. SOUTHERN RY. CO.

tenements within the area of a railway station came within the proviso to s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, and were not railway hereditaments, but were rateable under the general law of rating. The premises in question here also come within that decision. The occupiers of the coal wharf were, therefore, liable to assessment and the proposal of February 22, 1937, was effective. The proposal did not relate to a "hereditament for the time being shown in "the railway valuation roll as a railway hereditament" within s. 18, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930. The first valuation roll had ceased to be effective on April 1, 1936, under s. 3, sub-s. 2, of the Act and on February 22, 1937, the roll referred to in s. 18, sub-s. 3, could not be the first roll. It was no longer a roll but only a piece of paper the validity of which had expired. In February, 1937, the second roll was in force, although it was not then completed. The assessment committee therefore have power to hear and determine the proposal. Further, although under s. 37 of the Rating and Valuation Act, 1925, it was the duty of the assessment committee to deal promptly with the proposal of the corporation, that does not mean that the committee were bound to come to a decision at a time when the first railway valuation roll had ceased to operate and the second railway valuation roll had not been completed. The proper course was to adjourn the hearing of the proposal until the second railway valuation roll had come into effect. If that roll had shown the premises in question as railway hereditaments the proposal would have dropped, but that could not have been so after the decision in *Westminster City Council* v. *Southern Ry. Co.* (1). The defendants relied on *Barratt* v. *Gravesend Assessment Committee* (2) as showing that the critical date for the purpose of any decision was the date of the proposal; and it might be said that at that date it was not known that the premises in question were no longer railway hereditaments, although there was reason for thinking so. That is why the proper course might well be for the assessment committee to adjourn the hearing. The defendants are seeking to rely on a defect in the machinery for assessment to escape the payment of rates for a time, but the court will not construe an Act so as to produce defective machinery. If, as Uthwatt J. held, there is an ambiguity in regard to whether s. 18, sub-s. 3, in referring to the railway valuation roll meant in such circumstances as

(1) [1936] A. C. 511.

(2) [1941] 2 K. B. 107.

the present the old roll or the roll which governed the quinquennium in the course of which the proposal was made, a meaning should be given to it that will enable rates to be charged continuously. When s. 17 and s. 18, sub-s. 3, are considered together, the reference in s. 18, sub-s. 3, to the railway valuation roll can only refer to the roll which will apply when completed, seeing that under s. 17 the second roll when completed will apply for all purposes as from April 1, 1936. All difficulty is avoided by the assessment committee's adjourning the proposal until that roll is ready.

Craig Henderson K.C. and *Colin Pearson* for the Southern Railway Co. A careful examination of the provisions of the Railways (Valuation for Rating) Act, 1930, shows that there is a gap unprovided for, namely, that between the expiry of one railway valuation roll and the completion of the next. In s. 18, sub-s. 1, there is an antithesis between a hereditament "for the time being shown in the valuation roll" and a hereditament "appearing . . . . in the valuation list for the "time being in force," and in sub-s. 3 the reference is to "a "hereditament for the time being shown in the railway valua"tion roll as a railway hereditament." There is never a reference to the valuation roll for the time being in force. Regard, then, must be had to the existing railway valuation roll which remains applicable until a second roll has been completed to take its place. Therefore, at the time of the proposal the premises in question were railway hereditaments and the assessment committee had no power to deal with them. The plaintiffs seek to get out of this difficulty by having the hearing of the proposal adjourned, but that is not possible when the assessment committee had no jurisdiction to deal with the proposal at the date when it was made. The fact that it was anticipated that this property would be excluded from the second railway valuation roll does not give the assessment committee jurisdiction. It is the duty of an assessment committee to deal with a proposal promptly under s. 37 of the Rating and Valuation Act, 1925, and an adjournment such as has been suggested would be impossible. Admittedly the defendants will escape paying rates for 1936 to 1938, but, however undesirable that may be, the provisions of the Act must stand. A position has arisen that was not foreseen. The Act contemplated and allowed for the first railway valuation roll being late, but expected every subsequent roll to be ready before the expiration of the quinquennium.

Whatever the consequences of this omission it is for the legislature and not the courts to remedy it.

Squibb for the occupiers of the wharf premises. For the assessment committee to have jurisdiction to deal with the proposal, they must have had it at the date of the proposal. No adjournment of the hearing could overcome this difficulty.

Turner K.C. replied.

Cur. adv. vult.

July 31. The following judgments were read.

LORD GREENE M.R. We are confronted with the task of construing an Act of Parliament in reference to a situation which Parliament clearly did not contemplate as likely to arise. Whichever view be taken, the result will be one which Parliament cannot have intended. In these circumstances it is, I think, legitimate, unless the language prevents it, to prefer that interpretation which will cause the least dislocation of the general scheme which the legislation lays down. Acting on this principle, Uthwatt J. decided in favour of the defendants. The result of his decision admittedly leads to injustice, but the interpretation which he rejected would have led to chaos, and, in my opinion, he chose the right alternative.

The question relates to the true meaning to be given to the words "the railway valuation roll" in s. 18, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930. The provisions of that Act were examined with great care by Uthwatt J. in his judgment and I need not refer to them at length. The Act replaced the earlier method of valuing railway hereditaments for rating purposes by a new method under which a value is allotted to each such hereditament by the new Railway Assessment Authority, and in respect of railway hereditaments the function of assessment committees becomes the merely ministerial one of copying into their valuation lists the particulars and values appearing in the successive railway valuation rolls prepared by the Railway Assessment Authority or in alterations of such rolls duly made. The machinery for producing this result is complicated, but I see no reason why it should not have worked smoothly if it had not been for the circumstances which have given rise to the present controversy.

In order that an assessment committee may perform the task of copying particulars and values from the railway valuation roll into the valuation list it is essential, in general, that at the time when the list is being prepared or, at any rate, at some time during its currency, there shall be in existence a railway valuation roll which is operative for at least part of the period during which the valuation list is current. The quinquennial period covered by the first railway valuation roll was that beginning April 1, 1931. The period covered by the second roll began on April 1, 1936. The relevant quinquennial period of Worthing Corporation began on April 1, 1933, and ended on March 31, 1938. The corporation naturally wished to ensure that its valuation list current for this period should be in conformity with the two railway valuation rolls each of which affected part of it. The earlier of the two railway valuation rolls contained the coal wharf now in question. It was completed on April 27, 1934, more than three years late, but the wharf was inserted as a railway hereditament at its appropriate valuation in the Worthing valuation list for the period April 1, 1933, to March 31, 1938. As the result of the decision of the House of Lords in *Westminster City Council* v. *Southern Ry. Co.* (1) the wharf was not included as a railway hereditament in the railway valuation roll for the period beginning April 1, 1936, and on this basis its rateable value as from that date fell to be ascertained in the ordinary way under the Rating and Valuation Act, 1925. If the second railway valuation roll had been completed at any time before March 31, 1938, it would have been possible for Worthing Corporation, by taking the appropriate steps, to ensure that their current valuation list should be amended as from April 1, 1936, by striking out the wharf as a railway hereditament and inserting it as a hereditament valued by the usual method of valuation for hereditaments other than railway hereditaments. The result of this would have been that rates would have been payable continuously in respect of the wharf during the whole of the Worthing quinquennium beginning on April 1, 1933. For the first three years the wharf was dealt with as a railway hereditament and the rates were payable by the railway company. For the remaining two years the wharf would have been dealt with and valued as an ordinary hereditament and the rates would have been payable by the occupier.

I have no doubt that this was the result which Parliament desired to achieve, but the whole scheme was upset by the delay in completing the second railway valuation roll. This

(1) [1936] A. C. 511.

C. A.
1942
WORTHING CORPORATION v. SOUTHERN RY. CO.
Lord Greene M.R.

roll was not completed until January 27, 1939, some ten months after the expiration of the quinquennium of Worthing Corporation. Sect. 17 of the Railways (Valuation for Rating) Act, 1930, makes provision for delay in completing a railway valuation roll, but it is clear that no such delay was contemplated as in fact took place. The provision in that section that each part of a roll as and when completed shall for all purposes take effect as from the date on which it is to come into operation does not make it possible to alter a valuation list for a quinquennium which has expired before the relevant part of the delayed roll is completed. The alteration of an expired valuation list is in certain circumstances permitted by the Act : see s. 12, sub-s. 5, and sch. IV., part II., paras. 2 and 3. But it is common ground that there is nothing in the Act which makes it possible in such a case as the present.

As the result of the decision of the House of Lords to which I have referred, it was obvious that the wharf would not appear in the railway valuation roll for the quinquennium beginning April 1, 1936. In anticipation of this and to make it possible to amend the current valuation list before it would expire on March 31, 1938, Worthing Corporation on February 22, 1937, made the proposal the validity of which is now in question. If that proposal was validly made, rates will be payable by the occupiers of the wharf in respect of the last two years of the Worthing quinquennium which ended on March 31, 1938. If it was not validly made, no rates will be payable in respect of the wharf for those two years. The matter is important and we were told that there are many similar cases throughout the country.

Sect. 18, sub-s. 3, provides that the elaborate machinery provided for valuation purposes by the Rating and Valuation Acts " shall not apply in the case of a hereditament for the "time being shown in the railway valuation roll as a railway "hereditament." At the date when the proposal was made, the first railway valuation roll had ceased to be in force (s. 3, sub-s. 2), and the second roll had not been completed. If the words "the railway valuation roll" in s. 18, sub-s. 3, are in their application to the present facts to be construed as referring to the first roll so that at the date of the proposal the wharf is to be treated as a railway hereditament, the proposal must have been invalid since the section so in terms provides. It would be no answer to say that the consideration of the proposal could have been adjourned since there would be no jurisdiction to adjourn it or to treat it in any way as an effective document when the section says that no proposal is to be made.

It is at first sight tempting to reject this construction and to treat the prohibition against proposals contained in the sub-section as inapplicable on the ground that there was at the time no railway valuation roll in force in which the wharf appeared as a railway hereditament, but an examination shows that the consequences of so reading the sub-section would be disastrous. The general scheme of the Act is to remove railway hereditaments from the operation of the Rating and Valuation Acts in regard to valuation (s. 1) and to make the railway valuation roll (subject to any permissible alterations and to the limited right of appeal conferred by s. 9) the conclusive test of the character of the hereditament. Assessment committees are thus deprived of all power to determine whether a hereditament is a railway hereditament or to proceed to a valuation of a railway hereditament. As I have said, they are reduced to the position of copyists. Now, the prohibition against the use of the ordinary machinery which is contained in s. 18, sub-s. 3, is confined to hereditaments which are shown in the railway valuation roll as railway hereditaments. If a hereditament is not shown as a railway hereditament in "the railway valuation roll" the prohibition does not apply, and the rating authority, the assessment committee and all others concerned have exactly the same duties, rights and powers in regard to it as they have in the case of hereditaments which are not railway hereditaments. If, therefore, in the present case the words "the railway valuation roll" do not in the circumstances apply to the first roll which was current from April 1, 1931, to March 31, 1936, there would not be any hereditament shown on a roll as a railway hereditament. The result would be that the machinery the use of which is prohibited by the sub-section in the case and only in the case of hereditaments which are shown on the railway valuation roll would come into action in respect of every single hereditament which had been shown in the first roll as a railway hereditament. As I have said, the result would be chaotic and I see no means of avoiding it other than by construing the words in question in the way in which Uthwatt J. construed them.

Sect. 18, sub-s. 1, appears to me to give strong confirmation to this view. That section directs the rating authority in preparing a valuation list to insert in it in respect of any "*hereditament for the time being shown in the railway valuation* "*roll as a railway hereditament*" the relevant values and other particulars appearing in the valuation list for the time being in force. The words which I have italicized are exactly the same as those used in sub-s. 3. This direction by its terms only applies to the class of hereditaments mentioned, namely, those shown on the roll. A hereditament which is not shown on the roll is not affected and the rating authority, when preparing a list, must deal with such a hereditament in the normal way. Accordingly, if (say) at the beginning of 1938 a rating authority was preparing a list for the purposes of the quinquennium beginning on April 1 of that year and if the first roll was not the "railway valuation roll" referred to, the direction to carry forward into the new list the values appearing in the current list would not apply to any of the hereditaments which appeared in the first roll as railway hereditaments and the rating authority would be bound to deal with every one of them in accordance with the Rating and Valuation Acts. This would make confusion worse confounded and the Act of 1930 would, in the events which have happened, have completely broken down.

I can find nothing in s. 17 to remedy this state of affairs. If the expression "the railway valuation roll" in sub-ss. 1 and 3 of s. 18 means the railway roll which, when it is completed, will be the roll governing the relevant period, i.e., in the present case the roll which was completed on January 27, 1939, it would have been necessary to defer the compilation of the Worthing list for the quinquennium beginning April 1, 1938, until the completion of the relevant part of the roll. This would have led to an impossible situation. Faced with these alternatives, both unsatisfactory but the one infinitely more unsatisfactory than the other, I feel constrained to agree with the view of Uthwatt J., and to say that, in my opinion, the appeal fails.

MACKINNON L.J. By s. 24 of the Railways (Valuation for Rating) Act, 1930, it is provided that that Act " shall be con-" strued as one with the Rating and Valuation Acts, and those " Acts and this Act may be cited together as the Rating " and Valuation Acts, 1925 to 1930." The resulting corpus of legislation provides, in the problem raised by this case, as obscure and difficult a series of puzzles as I have ever tried to unravel.

The general scheme of the two Acts is manifest. Under the Act of 1925 it is the duty of each assessment committee to prepare a valuation list of every hereditament in its area with its relevant values. The Act of 1930 set up a Railway Assessment Authority. The duty of the Railway Assessment Authority is to prepare for each railway a railway valuation roll, specifying every railway hereditament and its value. That value is to be arrived at by an elaborate process under which the value of all the railway hereditaments of a particular company is assessed by reference to certain average net receipts of the company, and then apportioning that total over all the particular railway hereditaments. Certain hereditaments, though the property of the company, are not to be included in the valuation roll as railway hereditaments or valued as such, e.g., an hotel, or premises so let out as to be capable of separate assessment. When it has completed the valuation roll the Railway Assessment Authority sends the roll, or the relevant part of it, to each assessment committee. The assessment committee is then under the duty of copying into its valuation list every railway hereditament and its valuation from the valuation roll, but, as regards any hereditaments belonging to a railway but not entered and valued as railway hereditaments in the valuation roll, the duty of the assessment committee to enter and value them in their valuation list remains.

It is obvious that a hereditament which figures as a railway hereditament in a valuation roll may subsequently, by revision of the roll, cease so to appear as a railway hereditament, or that one which has been entered as a railway hereditament in one quinquennial valuation roll may cease to appear as such in the ensuing valuation roll. Conversely, a hereditament which in either case has not been entered as a railway hereditament may, on revision of the roll or in the ensuing roll, appear as a railway hereditament. Reading the Act of 1930 as a whole I have no doubt at all that the intention of the legislature was that on such a change occurring the relevant assessment committee should follow suit, i.e., if what has hitherto been a railway hereditament in the roll has ceased to be so the assessment committee should at once enter and value it in their valuation list, while if what has previously been in the valuation list as a non-railway hereditament appears as a

C. A.
1942
~~~
WORTHING CORPORATION v. SOUTHERN RY. CO.
MacKinnon L.J.

railway hereditament in a revised or new valuation roll, the assessment committee should enter it in their valuation list as a railway hereditament with the value fixed by the valuation roll.

This, I say, is obviously the intention of the Act. If the valuation list and the valuation roll were both in existence at the beginning of the same quinquennial period, the working of the plan would be simple, but unfortunately the quinquennial periods for each list began at a different date to that for each roll, and by reason of the magnitude of the task imposed on the Railway Assessment Authority, and their being involved in protracted litigation ending in the House of Lords, the completion and publication of their valuation rolls were very greatly delayed. Because of these circumstances, and because of the complicated machinery of the Act of 1930, the present problem arises.

On February 22, 1937, the Worthing rating authority made a proposal to the district assessment committee for the inclusion of Messrs. Hall's coal wharf at Worthing railway station in the local valuation list. This was a proposal for the amendment of the list, and the reason given for it was: "To be separately assessed because it does not form part of "a railway hereditament." If the coal wharf was specified in "the" railway valuation roll as a railway hereditament the assessment committee could not entertain this proposal, for, by s. 18, sub-s. 3, of the Act of 1930, the provisions of the Act of 1925 with regard to amending the valuation list "shall "not apply in the case of a hereditament for the time being "shown in the railway valuation roll as a railway hereditament." But if the coal wharf was not specified in "the" valuation roll as a railway hereditament this prohibition would not apply and the assessment committee could and ought to entertain the proposal.

What, then, was "the" valuation roll in which this hereditament was "for the time being shown" as being, or not being, a railway hereditament on February 22, 1937? There was in existence on that date a document rightly described as "a" railway valuation roll, and in that document the coal wharf did appear as part of a railway hereditament, but it was the valuation roll for the quinquennium April 1, 1931, to March 31, 1936. If the Railway Assessment Authority could have discharged its duty with exact promptitude this roll would have been superseded on April 1, 1936, by the new
~~~

(second) roll for the quinquennium April 1, 1936, to March 31, 1941. Of that second roll the Railway Assessment Authority was on February 22, 1937, still in labour, and of it the Railway Assessment Authority was only delivered on January 27, 1939. When the second roll thus belatedly appeared the coal wharf did not appear in it as a railway hereditament. That was in obedience to the decision of the House of Lords in May, 1936, and it was in the certain anticipation that, because of that decision, in the unborn but overdue second valuation roll this would be the status of the coal wharf that the Worthing rating authority made the proposal of February 22, 1937.

The argument for the defendants, which was accepted by Uthwatt J., is that on receiving this proposal, the assessment committee ought to have said: "We have no jurisdiction "to entertain this proposal. Sect. 18, sub-s. 3, of the Act "of 1930 forbids us to do so as regards 'a hereditament for the "'time being shown in the railway valuation roll as a railway "'hereditament.' This coal wharf does appear in the railway "valuation roll for the quinquennium 1931–1936 as a railway "hereditament. It is true that that quinquennium is over, "and the Railway Assessment Authority is preparing a "valuation roll for the second quinquennium which will "cover February, 1937. It is also true that we all know that "when we receive the second valuation roll this coal wharf "will not figure in it as a railway hereditament, for that is in "accordance with the decision of the House of Lords, but we "have not yet received that second roll and, therefore, 'the' "valuation roll which 'for the time being' shows the status "of this coal wharf must be the first roll in which it "appears as part of a railway hereditament. Therefore "s. 18, sub-s. 3, forbids us to entertain the proposal." And it is said that this attitude accords with the duty imposed on the assessment committee by s. 37, sub-s. 11, of the Act of 1925, under which an assessment committee shall hold such meetings as are reasonably required for the prompt disposal of proposals. If this argument prevails it is admitted that the practical result (for reasons which I need not detail) will be that the rating authority will receive no rates for this coal wharf for two years. Manifestly, such a result was not intended by the legislature. Indeed the defendants frankly avow that it is the result of a casus omissus in the elaborate provisions of the Act of 1930. Sect. 12, sub-s. 5, of that Act begins, "Where the effect of "any information given under sub-s. 2 of this section is," etc.,

C. A.

1942

WORTHING CORPORATION v. SOUTHERN RY. CO.

MacKinnon L.J.

and Mr. Craig Henderson conceded that if that sentence had read: "Where the information given under sub-s. 1 or 2 of "this section is," etc., the casus omissus would not arise, and this originating summons would never have been heard of.

The question is whether, notwithstanding the obvious intention of the whole Act, we are bound to say that the language of s. 18, sub-s. 3, compels us to hold that the assessment committee had no jurisdiction to entertain the proposal of February 22, 1937. I do not think we are. That speaks of "a hereditament for the time being shown in the railway "valuation roll." The ultimate question is: "What is the "railway valuation roll?" Is it the first roll which is in existence, but the effect of which is spent? Or is it the second roll which is physically not yet in existence, however much it ought to be, and which will relate back to February, 1937, directly it does appear? Section 17 expressly provides that any delay by the Railway Assessment Authority in completing the roll shall not render it or any part of it invalid "and each "part of the roll as and when completed shall for all purposes "take effect as from the said date" (i.e., in this case, as from April 1, 1936). I see no reason why "all purposes" should not include the explanation of the term "the valuation roll" in s. 18, sub-s. 3. If on February 23, 1937, the parties appeared before the assessment committee, asking them to deal with the proposal of February 22, I think the assessment committee ought to have said to them: "We cannot yet deal with this "proposal. Whether we can do so depends on the contents "of the railway valuation roll which is now in preparation by "the Railway Assessment Authority, but is not yet completed. "When it is complete it will, under s. 17, relate back for all "purposes to a period which includes yesterday, and when we "receive it we shall be able to see whether under s. 18, sub-s. 3, "we can entertain the proposal. In these circumstances a "meeting which is reasonably necessary for the prompt "disposal of this proposal is necessarily postponed until we "receive the railway valuation roll from the Railway Assessment Authority, of which we will give you due notice. The "consideration of the proposal is therefore adjourned to that "time." If, mindful of the incitement to promptness in s. 37, sub-s. 11, of the Act of 1925, the assessment committee was anxious to minimize this adjournment, I do not see why they should not under s. 8, sub-s. 3, of the Act of 1930 require the Railway Assessment Authority to state in writing whether this coal wharf had or had not been treated by them as a railway hereditament. If they had done so, the Railway Assessment Authority would undoubtedly have replied that in the roll now in preparation the coal wharf had been, or would be, treated as not a railway hereditament in obedience to the decision of the House of Lords. This reply would then be "binding on all persons concerned." Incidentally, I may remark that an inquiry by the assessment committee under s. 8, sub-s. 3, appears to be one to be made before the completion of the roll, for after its completion the relevant parts of it are to be sent to the assessment committee under s. 8, sub-s. 4, and any inquiry as to its contents must be unnecessary, especially having regard to s. 8, sub-s. 2, para. iv.

I, therefore, think that the answer to the first question in the originating summons should be "Yes," and to the second question "No," and I would allow this appeal.

Luxmoore L.J. [after stating the facts and the material statutory provisions :] The Southern Railway have contended that the corporation's proposal was ineffective because at the time when it was made the only railway valuation roll in existence included the coal wharf as a railway hereditament. The corporation, on the other hand, contended that the proposal was effective although it admitted that it could not be considered until after the second railway valuation roll came into existence as the effective roll. The solution to the question which of these contentions is correct is, in my judgment, to be found in s. 18 of the Act of 1930. That section provides in sub-s. 1 that as from the appointed day a rating authority, in preparing a draft valuation list or a new valuation list under the Rating and Valuation Acts (i.e., the Acts of 1925 and 1930) shall enter therein in respect of any hereditament for the time being shown in the railway valuation roll as a railway hereditament, the values and other particulars appearing in respect of that hereditament in the valuation list for the time being in force, and, while that hereditament remains in the roll, no amendment shall be made in the values or other particulars so entered except in pursuance of a notice sent to the assessment committee by the Railway Assessment Authority under the provisions of the Act relating to the notification to assessment committees of values and of alterations of values of railway hereditaments. Pausing here I should point out that the proposal of the corporation was made, not in connection with the preparation of a draft valuation list or a new valuation list, but in connection with the amendment of the valuation list for the time being in force for the quinquennial period of the rating authority ending on March 31, 1938. The words of the sub-section appear to negative the power of the rating authority to make any amendment of the nature specified in its valuation list for the time being in force while a hereditament in respect of which the amendment is sought remains on the railway valuation roll as a railway hereditament, and it, therefore, seems to me that the problem resolves itself into the question what is meant by the phrase "the railway valuation roll." Does it mean the roll for the time being in existence or the roll for the time being in force? In considering the matter it seems to me to be important to observe that the sub-section refers to the railway valuation roll as a document containing certain particulars which denote certain hereditaments as being railway hereditaments while the reference to the valuation list is to that for the time being in force. The Act of 1930 undoubtedly contemplated delay in completion of a railway valuation roll: see s. 17 to which reference has already been made; and it is not unnatural to suppose that until a new railway valuation roll came into operative existence the last existing railway valuation roll would, so far as hereditaments entered in it as railway hereditaments were concerned, govern and control the functions of a rating authority, otherwise the rating authority would be placed in a position of complete uncertainty during a period extending from the expiration of a quinquennial period under the Act of 1930 and the coming into being of the railway valuation roll for the current quinquennial period under that Act next after that which had expired. This view is, I think, supported by the fact that in s. 18, sub-s. 3, the provisions of the Rating and Valuation Acts, 1925 to 1929, with regard to objections, appeals and revision or amendment of current valuation lists by means of proposals and other matters are made inapplicable to a hereditament for the time being shown on a railway valuation roll as a railway hereditament.

In my judgment, the railway valuation roll to which reference had to be made under the Act of 1930 on February 22, 1937, was the first railway valuation roll which was the only railway valuation roll than in physical existence, and that Uthwatt J. came to the correct conclusion in so holding.

C. A.
1942
WORTHING CORPORATION v. SOUTHERN RY. Co.

I need hardly say that I have come to this conclusion with considerable hesitation, for I realize that its effect must be to deprive the corporation of rates for a period of some two years in respect of the coal wharf and also because I find that MacKinnon L.J. has taken a different view. In my judgment, the appeal fails and should be dismissed with the usual consequences.

Appeal dismissed.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for Town Clerk, Worthing.*
Solicitor for Southern Railway Co.: *H. L. Smedley.*
Solicitors for occupiers: *Braby & Waller.*

H. C. G.

BENNETT J.
1942
July 7.

In re SUTCLIFFE.
JACKMAN *v.* SUTCLIFFE.
In re SUTCLIFFE.
HOUGHTON *v.* SUTCLIFFE.

Administration—Practice—Proceedings for appointment of receiver—Proceedings begun before grant of probate obtained—Writ—R. S. C., O. LV., *rr.* 3, 4, 5*—Undertaking by creditor to procure grant to himself—No security ordered—Obligation of receiver to account.*

Where a creditor begins proceedings for the appointment of a receiver of the estate of a deceased person before a grant of probate has been obtained, those proceedings must be by writ and not by originating summons, and the creditor must undertake, if necessary, to take steps to procure a grant to be made to himself.

A receiver appointed in such a creditor's action should, where security is not ordered, be required to lodge his first account within fourteen days after the expiration of his receivership or three months from the date of the order under which he is appointed, whichever period is the shorter.

MOTIONS.

A testator died on April 27, 1939, and one of the two executors appointed under his will proceeded to carry on his practice as a solicitor which formed part of his estate. Before probate was applied for, two creditors began proceedings against the executors for the appointment of a receiver of the estate and manager of the practice. One creditor began his proceedings by originating summons under R. S. C., O. LV., issued on June 24, 1942, and the other by writ, issued on June 29, 1942. The relief claimed by both the originating summons and the writ was that a receiver and manager be appointed until a legal personal representative had been duly constituted by the Probate Division, and that, after the appointment of the legal personal representative, the estate might be administered by the court. The proceedings came before the court on two motions, which were heard together.

A. G. N. Cross for the motion in the proceedings by originating summons. This applicant is entitled to proceed by originating summons. Receivers have been appointed under that procedure: see Annual Practice, 1942, p. 1151. In the present case, although probate has not been obtained, one of the executors has interfered in the management of the estate and has become an executor de son tort. An originating summons is, therefore, the appropriate procedure. [Bennett J. referred to *In re Leask* (1) and *In re Chalmers* (2).]

R. W. Goff for the motion in the proceedings by writ. The application for the appointment of a receiver should be by writ and not by originating summons. R. S. C., O. LV., deals only with duly constituted legal personal representatives: see, especially, rr. 3, 4. Applications of this kind cannot suitably be tried in proceedings by originating summons, or on motion.

G. A. Russo for the executors. The proceedings by originating summons have been misconceived. The motion in those proceedings should be dismissed. [He was stopped.]

BENNETT J. The first question which arises is whether the relief which is sought can be claimed in proceedings initiated by originating summons. The objection is taken that R. S. C., O. LV., applies only to a case in which a legal personal representative of a deceased person has been constituted either by a grant of probate or of letters of administration and has no application before such a grant has been made.

(1) (1891) 65 L. T. 199.

(2) [1921] W. N. 129.

There is clear authority for the proposition that where proceedings for administration are begun against a person sued as entitled to take a grant of letters of administration, such proceedings cannot be begun by an originating summons, but must be initiated by a writ of summons: see *In re Leask* (1) and *In re Chalmers* (2); but it was argued that there is a distinction to be drawn between the case of a person sued as the person entitled to take a grant of letters of administration and a person sued as the person named as executor in a will which he has not proved since he derives his title, not from the grant only, but from the will. That depends, I think, on the language of O. LV., rr. 3, 4 and 5, and, when the language of those rules is considered, it seems to me plain that they regulate proceedings by or against executors or administrators who have obtained grants and do not apply in a case where a grant has not been obtained.

Then it was said that one of the executors had made himself executor de son tort and that in such a case proceedings for administration can be begun by originating summons. The answer to this point is also, I think, the language of the rules which contemplates proceedings either by or against properly constituted legal personal representatives. A further objection to proceedings by originating summons against persons who are said to have become legal personal representatives de son tort is that that allegation may give rise to a disputed question of fact, and an originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained. That, I think, is one of the grounds on which Astbury J. proceeded in *In re Chalmers* (2). For these reasons, on technical grounds, which seem to me quite clear, I am unable to grant the relief sought on the motion in the proceedings begun by originating summons.

In the other proceedings, begun by writ, I can, and, on the facts proved, ought to, appoint, and do appoint, a receiver of the estate of the testator. Recently there have been at least two cases in which administration actions have been begun and have proceeded for a long time against persons not legally constituted as legal personal representatives. One case, to my knowledge, has given rise to a difficulty. It may not be possible to compel a defendant, whether named in the will as an executor or named as a person entitled to take a grant of administration, to take a grant, and a decree for administration cannot be made unless a legal personal representative has been duly constituted. At the same time it may be, and in this case it is, of the first importance to a creditor to protect the assets of the deceased, and in some cases the only way to do so is by the appointment of a receiver. It is important to ascertain the proper practice to be pursued in cases of this kind, because in some of them a plaintiff suing as a creditor and not being able to have a legal personal representative constituted, and having had a receiver appointed who has collected considerable assets, has found it to be more to his interest to abandon his action and give up his debt than to take a grant himself. That is an impossible position in which to place the court, and I have, therefore, thought it right to exact from the plaintiff in the action begun by Mr. Goff's client, and I propose to exact it from plaintiffs in similar cases in future, an undertaking that, if no grant of administration to the estate of the testator shall have been made before the expiration of three calendar months, he will forthwith after that date apply in chambers for the direction of the judge, and will, if so directed, take all necessary steps to procure a grant to be made to himself. It seems only fair to insist on the plaintiff in such circumstances as these giving such an undertaking, for the reason which brings him to the court is to obtain out of the assets of the deceased payment of his debt.

---

(1) 65 L. T. 199.

(2) [1921] W. N. 129.

There is only one other matter which must be dealt with, and that is as regards the liability of the receiver to account. Often a receiver is not ordered to give security and is appointed on the plaintiff's undertaking. The reason why security is not ordered is that, as soon as a grant is obtained, the receiver disappears, and, there being somebody answerable to the estate of the deceased, the technicality of the continuance of a receiver is unnecessary. In such circumstances the appointment of a receiver does not come to the knowledge of the master in chambers, and it is unusual in such a case to make any provision for the furnishing of accounts. If security is not ordered in such cases, it seems that the right provision to make in the order is that the receiver is to lodge his first account within fourteen days after the expiration of his receivership, or three months from the date of this order, whichever period shall be the shorter, and is to lodge his subsequent accounts and pay the balance which may be certified to be due from him as the court may direct. I propose, therefore, to appoint a receiver and to name the person put forward in the proceedings which were begun by writ.

BENNETT J.
1942
SUTCLIFFE, *In re*.
JACKMAN *v.* SUTCLIFFE.
SAME.
HOUGHTON *v.* SAME.

Solicitors: *Smith & Hudson, for Gosschalk & Austin, Hull; Burton, Yeates & Hart, for Blakeston & Brown, Driffield; Seeley & Son.*

J. L. D.

In re ROUTLEDGE.

MARSHALL *v.* ELLIOTT.

BENNETT J.
1942
July 7, 8, 9, 14.

Will—Construction—Rule in Shelley's Case—Devise to X for life and then to the heirs male of his body living at his decease his heirs and assigns for ever and failing such issue a gift over—Issue of X, one daughter—Predecease of X by daughter—Eldest son her surviving.

A testator gave and devised to his trustees certain lands and hereditaments (subject to certain life interests, annuities, and mortgages) on trust to pay the rents and profits thereof to his nephew, X, for his life and after his death "to the use of the heirs "male of the body of X living at his decease his heirs and assigns "for ever and failing such issue then I give and devise the said "lands and hereditaments unto and to the use of my said "brother John his heirs and assigns for ever." X died, having had issue only one daughter, who predeceased him, leaving, among the six children of her marriage, her eldest son Y. her surviving:—

Held, that the rule in *Shelley's Case* (1579) 1 Co. Rep. 93b did not apply, and that, on the death of X, an estate of inheritance in fee simple passed to Y.

ADJOURNED SUMMONS.

By his will, dated March 24, 1870, George Routledge (hereinafter called "the testator") gave and devised unto his trustees certain lands and hereditaments (subject to certain life interests, annuities, and mortgages) upon trust to pay the rents and profits thereof to his nephew William Thomas Routledge for his life and after his death "to the use of the heirs male of the body of the said William "Thomas Routledge living at his decease his heirs and assigns

BENNETT J.
1942
ROUTLEDGE, *In re.*
MARSHALL *v.* ELLIOTT.

"for ever and failing such issue then I give and devise the "said lands and hereditaments unto and to the use of my "said brother John his heirs and assigns for ever." On April 27, 1874, the testator died, his will being proved on August 13, 1874. On June 29, 1880, his brother, John, died unmarried. On January 30, 1886, William Thomas Routledge became entitled in possession under the testator's will to the hereditaments for such estates therein as were thereby devised to or in trust for him, subject to two mortgages. By his will, dated June, 17, 1937, William Thomas Routledge appointed Agnes Dorothy Marshall and Robert William Bell executors thereof. On June 19, 1937, he died, and his will was proved on September 9, 1937. His only child, a daughter, Isabella Mary Routledge, was married on January 8, 1914, to Walter Thomas Douglas and she died on June 11, 1937. By that marriage there were six children, three sons, of whom the eldest, William Routledge Douglas, was born on August 26, 1916, and three daughters. Various questions having arisen under the wills of the testator and of William Thomas Routledge, the executors of the will of William Thomas Routledge took out a summons to determine (inter alia) the true construction of the disposition of the hereditaments contained in the will of the testator. After hearing argument on the question as to the estate taken by the trustees of the testator's will, his Lordship held that the legal estate in the property was vested in them at the death of the testator. The question of the devolution of the property was then argued.

C. A. J. Bonner for the executors of the will of William Thomas Routledge (appointed to represent also, for the purposes of this application, the person or persons entitled in the event of the gift over in favour of John Routledge having taken effect). On the true construction of the testator's will *Shelley's Case* (1) applies: see *Van Grutten* v. *Foxwell* (2); and each devise is a devise to William Thomas Routledge in tail male. *Goodright* v. *Pullin* (3) is precisely in point, and the expression "living at his decease" does not vary this construction: *Richards* v. *Bergavenny* (4). On this footing William Routledge Douglas, whose mother was the only child of William Thomas Routledge, cannot take, since he does not trace his descent from William Thomas Routledge exclusively though males and the gift over in favour of John has taken effect. An alternative construction is that William Thomas Routledge took a fee simple in the properties concerned on the footing that the words "his heirs" in the expression "his heirs and assigns for ever" mean William Thomas Routledge's heirs and so bring in the whole series of his heirs taking in a course of succession: *Van Grutten* v. *Foxwell* (1). On this basis the gift over took effect on the failure of "such issue" i.e., the heirs male of the body of William Thomas Routledge living at his decease. It has never been suggested that Lord Coke's rule (see Co. Litt. 24b; Hawkins on Wills, 3rd ed., p. 204; *Lightfoot* v. *Maybery* (2)) applies to a case such as that of this gift over. The devises cannot be construed as devises after William Thomas Routledge's death to the person taking by purchase and in fee simple who, at William Thomas Routledge's death, should be the heir male of his body: *Richards* v. *Bergavenny* (3); *Fuller* v. *Chamier* (4). If, however, the court takes the view that they can be so construed, it cannot be contended on the authorities as they stand that Lord Coke's rule is not applicable.

---

(1) (1579) 1 Co. Rep. 93b.

(2) [1897] A. C. 658, 667, 684.

(3) (1726) 2 Strange, 729; 2 Ld. Ray. 1437.

(4) (1695) 2 Ver. 324.

Belsham for a specific devisee under the will of William Thomas Routledge.

Stranders for William Routledge Douglas. This is not a case in which the rule in *Shelley's Case* (5) applies. Before that rule can apply, the will must be construed to see whether it was intended to include the whole line of heirs or issue: see *Van Grutten* v. *Foxwell* (1). In the present will there are at least four indications that it was not intended to include the whole line of heirs—first, the express life estate given to William Thomas Routledge (as to the importance of which, see *Archer's Case* (6)); secondly, the words "living at his "decease"; thirdly, the engrafted words "his heirs and "assigns"; and fourthly, the words "failing such issue." The case is a plain application of *Archer's Case* (6) on the footing that the testator has made a gift to a person to be ascertained at a particular time, namely, on the death of William Thomas Routledge. What is intended is one person, and William Routledge Douglas is that person and he takes an estate in fee simple on the death of William Thomas

---

(1) [1897] A.C. 658.
(2) [1914] A. C. 782.
(3) 2 Ver. 324.
(4) (1866) L. R. 2 Eq. 682.
(5) 1 Co. Rep. 93b.
(6) (1597) 1 Co. Rep. 66.

Routledge. The difficulty caused by the use of the plural word "heirs" is not insuperable, for the gift may be to a persona designata even though the word "heirs" in the plural is used, provided that it appears on construction to have been the intention of the testator to designate one person: see *Greaves* v. *Simpson* (1); *In re Hussey & Green's Contract* (2); *Evans* v. *Evans* (3). The use of the plural "heirs . . . . living "at his decease" is clearly a mistake because there could only be one heir living at his decease. *Richards* v. *Bergavenny* (4) is distinguishable because there no life estate was expressly given to Lady Bergavenny and no words of limitation were engrafted on the gift to the heir living at her decease. Likewise, *Goodright* v. *Pullin* (5) is distinguishable because the words "living at his decease" were absent. To refer the word "his" to William Thomas Routledge would render the words "his heirs and assigns" in the result nugatory. [He also referred to *Willis* v. *Hiscox* (6).] Alternatively, if the rule in *Shelley's Case* (7) applies, the gift here was an estate in tail general to William Thomas Routledge, and William Routledge Douglas is tenant in tail.

Humphrey King for other parties interested.

BENNETT J. I propose to read two passages, one from the speech of Lord Herschell and the other from that of Lord Davey in *Van Grutten* v. *Foxwell* (8), since it is by these passages that I have been guided in coming to a decision. Lord Herschell said: "The rule in *Shelley's Case* (7) cannot, "I think, be regarded as a mere rule of construction designed "to carry out the intentions of the testator, and which will "therefore yield to any indication of a contrary intention to "be found in the will. It is a rule of law that where an estate "is devised to the 'heirs' or 'heirs of the body' of a person "to whom a prior estate of freehold has been given, the heirs "take by descent, and not by purchase, and that an estate "in fee simple or in fee tail is created in the ancestor. A "testator can no more make such a devise and direct that it "shall not have this operation than he can, in terms, create "an estate in fee simple or an estate tail, and then direct that

---

(1) (1864) 33 L. J. (Ch.) 641, 646.

(2) [1921] 1 Ch. 566, 570.

(3) [1892] 2 Ch. 173.

(4) 2 Ver. 324.

(5) 2 Strange 729; 2 Ld. Ray. 1437.

(6) (1838) 4 My. & Cr. 197.

(7) 1 Co. Rep. 93b.

(8) [1897] A. C. 662.

"these estates shall not have the incidents which the law "annexes to them. If words be superadded purporting to "have that effect they must be treated as absolutely in-"effectual. So, too, must words inconsistent with the "possession of an estate tail or in fee simple by one to whom a "life estate has been devised, with a subsequent limitation to "his heirs, special or general. At the same time, if the words "which are added, or, indeed, any provisions to be found in "other parts of the will, show that the expression 'heirs' "or 'heirs of the body' was not intended to be used in the "ordinary legal sense, but was intended to designate some "individual person or particular class of persons, effect may "be given to the intention of the testator thus expressed. "The rule in *Shelley's Case* (1) does not then apply, because "the limitation after the estate for life is not upon the true "construction of the will to the heirs or heirs of the body of "the tenant for life in the legal sense of those words, any more "than it would have applied if the gift had been in terms to a "designated person or a designated class." Lord Davey said (2): "In my opinion the rule in *Shelley's Case* (1) is a rule of law "and not a mere rule of construction—i.e., one laid down "for the purpose of giving effect to the testator's expressed "or presumed intention. The rule is this: that wherever an "estate for life is given to the ancestor or propositus, and a "subsequent gift is made to take effect after his death, in such "terms as to embrace, according to the ordinary principles "of construction, the whole series of his heirs, or heirs of his "body, or heirs male of his body, or whole inheritable issue "taking in a course of succession, the law requires that the "heirs, or heirs male of the body, or issue shall take by descent, "and will not permit them to take by purchase, notwith-"standing any expression of intention to the contrary. "Wherever, therefore, the court comes to the conclusion that "the gift over includes the whole line of heirs, general or "special, the rule at once applies, and an estate of inheritance "is executed in the ancestor or tenant for life, even though "the testator has expressly declared that the ancestor shall "take for life and no longer, or has endeavoured to graft "upon the words of gift to the heirs, or heirs of the body, "additions, conditions, or limitations which are repugnant "to an estate of inheritance, and such as the law cannot give "effect to. The rule, I repeat, is not one of construction, and,

(1) 1 Co. Rep. 93b.

(2) [1897] A. C. 684.

"indeed, usually overrides and defeats the expressed intention "of the testator; but the question always remains, whether "the language of the gift after the life estate properly construed "is such as to embrace the whole line of heirs or heirs of the "body or issue, and that question must be determined apart "from the rule, according to the ordinary principles of construction, including those which I have already referred to. "The testator may conceivably show by the context that he "has used the words 'heirs' or 'heirs of the body,' or 'issue' "in some limited or restricted sense of his own which is not "the legal meaning of the words—e.g., he may have used the "words in the sense of children, or as designating some "individual person who would be heir of the body at the time "of the death of the tenant for life, or at some other particular "time. If the court is judicially satisfied that the words are so "used, I conceive that the premises for the application of the rule "in *Shelley's Case* (1) are wanting, and the rule is foreign to the "case. But I repeat, that in every case the words are to be "interpreted in their legal sense as words of limitation, unless "it be made plain to the mind of the court that they are not "so used, and in what sense they are used by the testator."

Having read those passages, I have, as I understand the matter, to ask myself two questions. The first is: Has it been made plain to the court that, when this testator used the words "heirs male of the body of William Thomas "Routledge living at his decease his heirs and assigns for "ever," he did not mean the whole series of heirs male of his body taking in a course of succession? If that question is answered in the affirmative the second question is whether the testator has made it plain to the court in what sense he did use those words.

The language which the testator has used leads me quite clearly to the conclusion that he was not making a gift to the whole series of heirs male of the body of William Thomas Routledge taking in a course of succession. The first part of the limitation provides for the ascertainment of the object of the gift at a particular point of time. It is true that the object is described in the plural, but the reference to the fact that the object is to be living at the death of William Thomas Routledge cannot, in my mind, be reconciled with the idea of a series of heirs male of the body taking in a regular course of succession. Having reached this conclusion, the

(1) 1 Co. Rep. 93b.

second question arises, namely, whether the testator has made it plain in what sense he did use the words under consideration. This is more difficult. It is certain that the words are capable of being construed in more ways than one, and it is also certain that there are difficulties in the way of and objections to any construction. I regard the limitation as containing two parts, the first part pointing to the object of the gift and the second part limiting the estate which is the subject of the gift. The first part tells the reader of the will that the object of the gift is the person (if such there be) who is the heir male of the body of William Thomas Routledge when he dies. The second part limits the estate which the designated person is to take in the hereditaments disposed of by the will. On such a reading the terms of the will are not such as to give rise to the application of the rule in *Shelley's Case* (1). The gift is a gift to a persona designata who takes an estate in fee by purchase.

The only question which remains to be considered is whether there is any authority which precludes me from arriving at that result as a matter of construction of the will, and a very forcible argument was addressed to me by Mr. Bonner who referred to a number of authorities with which I must deal. The first authority on which Mr. Bonner relied was *Goodright* v. *Pullin* (2). In that case the devise was as follows: "I "Nicholas Lisle give and bequeath unto my wife all that my "messuage or tenement called Hattersfield, to hold for the "term of her natural life, and after her decease, then to my "kinsman Nicholas Lisle, for and during the term of his "natural life, and after his decease unto the heirs males of the "body of the said Nicholas lawfully to be begotten and his "heirs for ever: but in case the said Nicholas die without "such heir male, then I give and bequeath the said premises "unto my kinsman Edward Lisle for and during his natural "life, and after his decease to the heirs males of his body law-"fully begotten and his heirs for ever; and for default of "such heir male, remainder over." On that question the Chief Justice is reported as having said as follows: "It will "be a difficult thing to make this an estate for life: and the "case of *King* v. *Melling* (3) answers all the objections, as to "the limitation to Nicholas for life. The word issue is a "proper word of purchase, but the word heirs is always a

---

(1) 1 Co. Rep. 93b.
(2) 2 Strange 729; 2 Ld. Ray. 1437.
(3) (1672) 2 Lev. 59.

"word of limitation, and the word heirs being used in this "case, the words after his decease, are of no force. The "words heir and heir male are nomina collectiva, and include "all the heirs of the devisee: and in *Archer's Case* (1) it was the "word next which confined it to one particular person, for "without that word, it would have been a limitation, and not "a purchase. The word his is the word which makes the "difficulty in this case; but I think that it may very properly "be referred to Nicholas himself. Suppose Nicholas had had "several sons; if the eldest had been made a purchaser by "this will, the other sons could not have taken; and there "must be stronger words than these to control the words "heirs males and make them words of purchase. I therefore "think this clearly to be an estate tail in Nicholas." Fortescue J. was of the same opinion, and he referred the word "heir" to Nicholas. On the authority of that case Mr. Bonner urged on me that the added limitation could not be regarded as an indication of an intention which enabled me to say that the rule in *Shelley's Case* (2) was not to be applied.

Having got rid of the added limitation, the next case that Mr. Bonner relied on was *Richards* v. *Bergavenny* (3) where there was a devise together with the furniture of a house to the Lady Bergavenny and "such heir of her body as should be "living at her death, and in default of such the remainder "over"; and it was contended that that limitation was one to which the rule in *Shelley's Case* (2) was to be applied, and that Lady Bergavenny took an estate-tail. The court held that the limitation of the estate of Lady Bergavenny and such heir of her body as should be living at her death with a remainder over for want of such heir was an estate-tail, and on that ground Mr. Bonner sought to get rid of the point, which Mr. Stranders made against him, based on the provision in the first limitation of the words "living at his decease." Putting the two authorities together, Mr. Bonner argued that I should be deciding contrary to authority if I decided that the present case was one to which the rule in *Shelley's Case* (2) did not apply. I think that the answer to that argument is to be found in the following statement in the judgment of Bowen L.J. in *Evans* v. *Evans* (4): "The rule in *Shelley's* "*Case* (2) is no guide to the construction of an instrument; "we have to ascertain the construction, and then see whether

---

(1) 1 Co. Rep. 66b.
(2) 1 Co. Rep. 93b.
(3) 2 Ver. 324.
(4) [1892] 2 Ch. 173, 188.

"the rule applies. It is contended by the respondents that "the three cases of *Richards* v. *Bergavenny* (1), *Bony* v. "*Taylor* (2), and *Mills* v. *Seward* (3) nearly cover the whole "ground. But it is not a right principle of construction to "say that one authority covers one point in the case before us, "and that another authority covers another point, and there-"fore a certain conclusion is to be come to. We must look at "the document as a whole." There I think you have, in those last few words of Bowen L.J., the answer to the argument which Mr. Bonner advanced based as to one part of this will on *Goodright* v. *Pullin* (4), and as to the other part of the will based on *Richards* v. *Bergavenny* (1). You must look at the will as a whole, and, so far as I know, there is no authority in which, in relation to a will which contains two provisions such as are to be found in this will, it has been decided that the rule in *Shelley's Case* (5) must be applied. The terms of this will seem to me to be singular, and, after having had the matter very ably discussed, I have come quite clearly to the conclusion as a matter of construction that the testator expressed his intention of making a gift after the death of William Thomas Routledge of the hereditaments in question to the person who at the death of William Thomas Routledge was then the heir male of the body of William Thomas Routledge and that person's heirs and assigns. On that construction, the gift is one to which the rule in *Shelley's Case* (5) does not apply.

The only other question on this part of the case is whether the heir male of the body living at the death of Thomas William Routledge is to be ascertained by descent or is to be ascertained in accordance with Lord Coke's statement in Coke on Littleton, 24b, and the Commentaries of Lord Coke in ss. 22 and 23. Mr. Bonner has conceded that, having regard to the authorities as they stand, he is not in a position to argue that the heir of the body must be ascertained as it would be in a case of descent. William Routledge Douglas combines in himself the qualities of being a male and of being the heir of William Thomas Routledge, and, in my judgment, he is the person now entitled to the hereditaments in fee simple.

Solicitors: *Machin & Co., for R. W. Bell, Longtown.*

---

(1) 2 Ver. 324.

(2) (1625) 2 Roll Abr. 253, pl. 3.

(3) (1861) 1 J. & H. 733.

(4) 2 Strange 729; 2 Ld. Ray. 1437.

(5) 1 Co. Rep. 93b.

J. L. D.

BENNETT J.

1942
June 9, 10, 11, 12; July 30.

LLOYDS BANK, LIMITED, AND ANOTHER *v.* DALTON.

Easement—Support—Enjoyment clam—Imputation to owner of servient tenement of knowledge or opportunity of acquiring knowledge—Alteration in dominant tenement—Change in burden on servient tenement.

The east side of a yard which adjoined four houses had been supported since 1876 by a factory building, and the north-east part of the yard, in which there was an outbuilding containing water-closets for the use of the tenants of the houses, had been supported since 1895 by a dye-works. The water-closets had been substituted for earth-closets within twenty years of action brought. In 1939 the owner of the factory and the dye-works demolished parts of his property with the result that the east side of the yard and that part of it on which the outbuilding stood were deprived of support and collapsed. In an action by the owners of the houses against the owner of the factory and dye-works for the cost of restoring the yard and loss of rent of the houses evidence was given that before the work of demolition was begun it was not possible to see any part of the yard or outbuilding from the dye-works or from any highway or other place to which any member of the public had access:—

Held, (1.) that in the circumstances the successive owners of the dye-works, assuming them to have been reasonable persons diligent in the protection of their interests, either must have known or must be taken to have had a reasonable opportunity of becoming aware of the fact that the dye-works were supporting the north-east part of the yard and the outbuilding, and, therefore, a plea that the easement of support had been enjoyed clam failed; (2.) that, as the substitution of the water-closets for the earth-closets had not imposed a substantially greater weight on the supporting building, there had been no such change in the burden on that building as would disentitle the owners of the yard to succeed in the action.

WITNESS ACTION.

The plaintiffs, Lloyds Bank, Ld., and Sarah Eleanor Sadler, as surviving executors of George Sadler, were the owners of four houses and a paved yard on their east. There was access to the yard from the street in which the houses stood over a covered passage-way, between two of the houses, which was owned by the plaintiffs. On the north-east side of the yard was an outbuilding with four water-closets for the houses. There had at first been earth-closets, but these had been replaced by the water-closets within twenty years before this action. The wall which served as a back wall to the outbuilding was also the south-west wall of a dye-works owned by the defendant, Frank Dalton, and was thirty-nine feet high, thirty-three feet wide, and nine inches thick. The defendant owned also a factory at the east side of the yard. The four houses had been built on a sand rock hill the sloping sides of which had been built up, thus making a surface for the yard. On the east side of the yard its paving stones were on four brick tunnels. To its north-east side the surface was on earth filling in the dip between the slope of sand rock and the south-west wall of the dye-works, the paving stones being on the earth filling and the outbuilding being on the paving stones. Since 1876 the factory had supported the east side of the yard and the tunnel arches beneath it, and since 1895 at the latest the south-west wall of the dye-works and the dye-works itself had supported the outbuilding and the north-east side of the yard. In 1939 the defendant demolished the dye-works and parts of the factory. During the demolition of the dye-works a bulge appeared in the defendant's side of the wall just below the site of the outbuilding. Ultimately the bulge burst. The earth filling beneath the paving stones in the yard fell through with some water from burst pipes which had caused the bulge, and the north-east part of the yard became unsafe, as also did the water-closets, which the local authority closed and replaced by earth-closets in another part of the yard. When the demolition work on the factory was completed its west wall, which had been left standing, fell, the tunnels beneath the yard slipped to the east, and the east side of the yard fell. The plaintiffs terminated the tenancies of the houses and demolished the houses because they had no water-closets. They claimed 350*l.* damages as the cost of restoring the yard, and damages for loss of rent. The defendant admitted that the east side of the yard and the arches bearing it had been supported by the factory since 1876, but denied that the demolition work on the factory had caused their collapse. The court found that it had caused it, and also that the dye-works had supported the north-east part of the yard since 1895 at the latest. The defendant, however, contended (1.) that that support had been enjoyed clam so that an easement had not been acquired by prescription, the evidence showing that just before the demolition was begun in 1939 neither the yard nor the outbuilding was visible from the dye-works or from any public place; (2.) that, if an easement had been acquired or had been in process of being

BENNETT J.

1942

LLOYDS BANK, LD. v. DALTON.

acquired, any right of the plaintiffs had ended when the water-closets had replaced the earth-closets.

A. C. Nesbitt for the plaintiffs. The plaintiffs are entitled to succeed. Their premises have in fact and apparently been receiving support from the east and the north-east. The support from the factory is admitted. The easement of support from the dye-works is one which the plaintiffs could acquire and have acquired by prescription. [He referred to *Dalton* v. *Angus* (1) ; Gale on Easements, 11th ed., pp. 211, 220 ; *Union Lighterage Co.* v. *London Graving Dock Co.* (2).]

Leonard Stone for the defendant. The defendant did not and could not know that the dye-works and its south-west wall were supporting the outbuilding and the north-east part of the yard. The onus is on the plaintiff to show that the defendant or his predecessors knew that the easement had been acquired, or to show circumstances from which they could have known it. There is no evidence that they did know or could have known. Therefore, the support has been enjoyed clam and the plaintiffs have not acquired an easement. [He referred to *Dalton* v. *Angus* (1) and *Union Lighterage Co.* v. *London Graving Dock Co.* (2).] Further, even if an easement was acquired or in course of being acquired, it was ended when the water-closets were substituted for the earth-closets. That increased the burden on the servient tenement and began the trouble which ultimately caused the pipes to break and the south-west wall to bulge. Having made that alteration the plaintiffs had no right to such support from the dye-works and its south-west wall as would have prevented their pipes from being fractured.

Nesbitt replied.

Cur. adv. vult.

July 30. BENNETT J. read the following judgment. As regards the plaintiffs' claim for an easement for the support of the north-east part of their yard by the dye-works, the first issue between the parties was on the facts and these I have found in favour of the plaintiffs. The defendant, however, sought to answer this part of the plaintiffs' claim by two matters of law. The first was that, although support had in fact been enjoyed since 1895, the enjoyment had been clam, and, therefore, no easement had been acquired under the

(1) (1881) 6 App. Cas. 740, 798.

(2) [1902] 2 Ch. 557.

Prescription Act. The second matter of law was that, if an easement of support had been acquired or ever had been in process of being acquired against the owner of the dye-works, whatever right the plaintiffs may have had had been put an end to at some time within the last twenty years when water-closets had been substituted for earth-closets. This change, so it was said, put a new and a different burden on the servient tenement.

Dealing first with the plea of clam, the defendant proved that in March, 1939, immediately before he started on his work of demolition, it was not possible to see any part of the plaintiffs' yard or of the outbuilding therein from the dye-works or from any highway or other place to which a member of the public had a right to go. It was on this basis of fact that the plea of clam was rested. There was no evidence given whether the dye-works were built before or after the plaintiffs' yard was built, but having regard to the fall of the ground and to the way in which the plaintiffs' yard had been built, it is reasonably clear that the side wall of the dye-works was up before the plaintiffs' yard was made, or that the building of that wall and of the yard must have been going on at the same time. The yard could not have been made unless the dye-works wall was there to retain the earth-filling on which the paving stones were placed. It is possible that the dye-works were completed before the plaintiffs' predecessors started to make the yard and to put up their outbuilding. It was not suggested that the plaintiffs' predecessors in title, in executing their works, had acted secretly. The defendant rested his case exclusively on the fact proved that in March, 1939, the yard and the outbuilding were not visible from the dye-works or from a highway or other public place.

It is clear law, I think, that an easement of support cannot be acquired unless the owner of the servient tenement has knowledge that his land or his building is in fact supporting the dominant tenement: *Dalton* v. *Angus* (1). There is an important passage in the speech of Lord Selborne L.C. in that case dealing with the doctrine of clam as to the knowledge or means of knowledge which has to be proved against the owner of the servient tenement. I will read the passage: "Upon the other three questions proposed to the learned judges, "which involve the doctrine of clam, as applied to the easement "of support, there has been much difference of opinion; four

(1) 6 App. Cas. 740, 801.

BENNETT J.

1942

LLOYDS BANK, LD. v. DALTON.

"of the learned judges being in the plaintiff's favour, and the "other three thinking that the jury were not properly directed "on that point. The inquiry on this part of the case is, as "to the nature and extent of the knowledge or means of "knowledge which a man ought to be shewn to possess, "against whom a right of support for another man's building "is claimed. He cannot resist or interrupt that of which he is "wholly ignorant. But there are some things of which all "men ought to be presumed to have knowledge, and among "them (I think) is the fact, that, according to the laws of "nature, a building cannot stand without vertical or (ordinarily) "without lateral support. When a new building is openly "erected on one side of the dividing line between two properties, "its general nature and character, its exterior and much of "its interior structure, must be visible and ascertainable by "the adjoining proprietor during the course of its erection. "When (as in the present case) a private dwelling-house is "pulled down, and a building of an entirely different character, "such as a coach or carriage factory, with a large and massive "brick pillar and chimney-stack, is erected instead of it, the "adjoining proprietor must have imputed to him knowledge "that a new and enlarged easement of support (whatever "may be its extent) is going to be acquired against him, "unless he interrupts or prevents it. The case is, in my "opinion, substantially the same as if a new factory had been "erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he "should have particular information as to those details of the "internal structure of the building on which the amount "or incidence of its weight may more or less depend. If he "thought it material, he might inquire into those particulars, "and then if information were improperly withheld from him, "or if he received false or misleading information, or if anything "could be shewn to have been done secretly or surreptitiously, "in order to keep material facts from his knowledge, the "case would be different." The question of the extent of the knowledge or means of knowledge on the part of the owner of the servient tenement was also considered by the Court of Appeal in *Union Lighterage Co.* v. *London Graving Dock Co.* (1) where Romer L.J. stated the principle in these terms: " .... "on principle, it appears to me that a prescriptive right to "an easement over a man's land should only be acquired

---

(1) [1902] 2 Ch. 557, 570.

"when the enjoyment has been open—that is to say, of such "a character that an ordinary owner of the land, diligent in "the protection of his interests, would have, or must be taken "to have, a reasonable opportunity of becoming aware of that "enjoyment."

In the present case the dominant tenement had in fact been supported by the servient tenement for more than forty years before March, 1939. The two tenements were on the slope of this hill. They were contiguous, and the defendant's tenement was below the plaintiffs' tenement. The buildings on the slope were close to one another. There was an open passage leading from Castle Terrace on to the plaintiffs' yard. Once in the plaintiffs' yard, it must have been obvious that the north-east end of that yard and of the outbuilding were supported by the dye-works, and the south-west wall of the dye-works. Lastly, the defendant was not called to give evidence at the trial. It is notorious that the owners of land and buildings are interested in their boundaries, and, in my judgment, the facts proved at the trial of this case lead irresistibly to the conclusion that the successive owners of the dye-works, assuming them to have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have had reasonable opportunity of becoming aware of the fact that the dye-works were supporting the north-east part of the plaintiffs' yard and of the outbuilding standing thereon. For these reasons, the plea of clam, in my judgment, fails.

As regards the second matter of law relied on by the defendant, namely, the alleged change in the burden cast on the servient tenement when the old earth-closets were replaced by water-closets, on the facts there is no substance in this point. The right which the plaintiffs assert is a right to have their building supported by the defendant's buildings, and the right is claimed because that support has been in fact enjoyed for over forty years. There might have been some substance in the point if the defendant had proved that the alteration in question had imposed a substantially greater weight on the supporting building, but no building ever remains of exactly the same weight throughout its existence. Wear and tear is always going on, repairs are inevitable, new inventions give rise to internal alterations and improvements. It would be impossible to establish a right by prescription to the easement of support for buildings, either by buildings or by land, if a

BENNETT J.

1942

LLOYDS BANK, LD. v. DALTON.

claim to such a right depended on proof that there never had been any alteration in the internal arrangement of the dominant tenement or an alteration made when repairing or renewing some part of the dominant tenement. The substitution of a new chimney-pot for an old one, the installation of a new hot water system into an old house, the provision of a new bath for an old one, and repairs or changes of that kind may, nay must, alter in some greater or less degree the burden which the servient tenement is supporting. To some extent it must, I think, be a question of degree. It might well be that if, in any case, it were proved that there had been a change at some time within a period of twenty years before action brought in the construction of the dominant tenement of such a kind as to throw a substantially greater weight on the servient tenement, then in such a case an easement for the support of the changed building could not be maintained, but when, as in the present case, there is no evidence of any greater burden being thrown on the servient tenement by the change in the dominant tenement, in my judgment, the right, whether it exists or is in course of being acquired, is not affected. I think, therefore, that the second matter of law with which the defendant seeks to answer the plaintiffs' claim is of no avail and that the plaintiffs have established their claim to support for their yard and for their water-closets by the dye-works as well as by the factory. That support was removed. The effect of its removal was to damage the plaintiffs' yard and the water-closets thereon, used by the tenants of their four dwelling-houses. Without the water-closets the houses were uninhabitable. The only question that remains is as to the amount of the damages. I propose to award the plaintiffs the round sum of 75*l*. to compensate them for their loss in respect of rent, making, with the sum of 350*l*., the cost of restoring the yard, a total of 425*l*. for damages, for which the plaintiffs are entitled to judgment. They are entitled also to their costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Peacock & Goddard, for Hunt, Dickins & Willatt, Nottingham.*

Solicitors for defendant: *Field, Roscoe & Co., for Dowson, Enfield & Co., Nottingham.*

K. R. A. H.

END OF VOL. AND OF CHANCERY SERIES FOR 1942.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1942, will be as follows :—

In the First Series,
[1942] Ch.
In the Second Series,
[1942] 1 K. B. [1942] 2 K. B. [1942] P.
In the Third Series,
[1942] A. C.

INDEX.

ADMINISTRATION — *Annuity — Deed of covenant — Future liability — Distribution of estate.*
In re ARNOLD - - **Simonds J. 272**

2. —— *Debts — Payment — Duty of executor — "Due diligence" — Onus of proof.*
In re TANKARD. TANKARD *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO., LD. **Uthwatt J. 69**

3. —— *Executor — Right of retainer — "Debts owing to personal representative in "his own right"—Debt due to executor and another as trustees of a settlement—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 2.
In re RUDD - - **Morton J. 421**

4. —— *Intestacy — Distribution of estate — Intestate of foreign nationality — Country occupied by enemy—No known liabilities abroad except certain specified debts —Payment to Custodian of Enemy Property of sum due in respect of specified debts—Need of advertisement for claims abroad.*
In re GESS. GESS *v.* ROYAL EXCHANGE ASSURANCE - - - **Morton J. 37**

5. —— —— *"Personal chattels"—Chattels not used for business purposes—Cattle on farm—Farm not carried on at a profit—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1 ; *s.* 55, *sub-s.* 1 (*x*).
In re OGILBY - - **Simonds J. 288**

6. —— *Limitation of action — Debt — Acknowledgment — Payment of debts — Executor also creditor — Probate affidavit by executor showing debt due to him—Bankruptcy of executor — Statement of assets — Inclusion of debt—Limitation Act,* 1623 (21 *Jac.* 1, *c.* 16).
BOWRING-HANBURY'S TRUSTEE *v.* BOWRING-HANBURY - - **Bennett J. 276**

7. —— *Practice — Proceedings for appointment of receiver—Proceedings begun before grant of probate obtained — Initiation by writ—Undertaking by creditor to procure grant to himself — No security ordered — Obligation of receiver to account.*
In re SUTCLIFFE - - **Bennett J. 453**

ADMINISTRATION—*continued.*
8. —— Survivorship — Simultaneous deaths of husband and wife — Statutory presumption — Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 184.
See In re LINDOP, sub tit. WILL.

ARMY—*Impressment — Vehicle — Case of emergency—Payment of compensation to possessors—Claim by owners — Army Act, s.* 113, *sub-s.* 4 ; *s.* 115 — *Army and Air Force (Annual) Act,* 1925 (15 *Geo.* 5, *c.* 25), *sch. II.*
ROADWAYS TRANSPORT DEVELOPMENT, LD. *v.* ATTORNEY-GENERAL - - **C. A. 208**

BANKER—English branch of enemy bank—Winding-up order — Claims of holders of foreign currency accounts — "Creditors" — Date for ascertaining enemy status.
See In re BANCA COMMERCIALE ITALIANA, sub tit. EMERGENCY LEGISLATION.

BANKRUPTCY — *Order for monthly payments out of salary "during the bankruptcy" —Discharge—Direction that payments be continued—Validity—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-s.* 2 ; *s.* 51, *sub-s.* 1.
In re GARDNER. *Ex parte* OFFICIAL RECEIVER - - - **Morton J. 50**

2. —— *Priority debts — Distress by landlord within three months before receiving order—Rent due from debtor's husband—Goods of debtor taken and sold — Assets insufficient to satisfy priority debts—Right of trustee to charge over proceeds of sale in favour of priority creditors—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 4.
In re CAIDAN - - **Morton J. 90**

3. —— *Surplus in hands of trustee — Right of bankrupt thereto—Payment of creditors in full — "Creditors" — Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 69.
In re WARD - - **Farwell J. 294**

COAL MINE. *See* MINES.

COMPANY — Compulsory winding-up — Debt incurred after outbreak of war—Jurisdiction of court to stay proceedings. *See* Emergency Legislation.

2. —— *Private company — Transfer of shares — Registration — Refusal — Powers of directors — Motives for refusal — Affidavit evidence.*
In re Smith and Fawcett, Ld.
C. A. 304

3. —— *Share — Allotment — Financial assistance for payment given by company — " Purchase "—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 45, *sub-s.* 1*—Director—Misfeasance — Acquisition of valueless shares in other company—Order.*
In re V. G. M. Holdings, Ld.
C. A. 235

4. —— *Voluntary liquidation — Previous distress—Indebtedness for purchase tax—Distress authorized by Commissioners of Customs and Excise — Stay of distress—Purchase Tax (No.* 2) *Regulations,* 1940 (*St. R. & O., No.* 2194 *of* 1940), *reg.* 11, *sub-reg.* 1.
In re Margot Bywaters, Ld.
Simonds J. 121

5. —— *Winding-up — Contributory — Liability—List of contributories and amount of liability finally settled—Power to reopen list—Companies (Winding-up) Rules,* 1929, *r.* 83.
In re Westways Garage, Ld.
Bennett J. 356

6. —— —— *Debenture—Debenture holder's action — Certificate for trustees' remuneration —Clerical error—Correction—Costs and remuneration of trustees—Priority as against debenture holder—R. S. C., Or.* lv., *r.* 71.
In re City Housing Trust, Ld.
Bennett J. 262

7. —— —— *Voting — Proxy — Scheme of arrangement with debenture holders — Meetings to approve scheme — Appointment of official Receiver as proxy—Validity—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 153*—Companies (Winding-up) Rules,* 1929 (*St. R. & O.,* 1929, *No.* 612), *r.* 150.
In re General Mortgage Society (Great Britain), Ld. - **Bennett J. 274**

COSTS—*Slip rule—Amendment of order — " Error arising from accidental slip or " omission "—Omission of counsel to ask for certain costs—R. S. C., Or.* xxviii., *r.* 11.
In re Inchcape - - **Morton J. 394**

DEATH — *Presumption — Airman reported missing — Certificate by Air Ministry of presumed death.*
In re Butler's Settlement Trusts
Bennett J. 403

DEATH—*continued.*

2. *See also In re* Forster's Settlement, sub tit. Emergency Legislation.

DIVORCE — *Alimony — Arrears — Recovery — Death of husband — Claim for administration of estate—Matrimonial Causes Rules,* 1937, *rr.* 62, 81.
In re Woolgar - - **Simonds J. 318**

DISTRESS—Bankruptcy — Priority debts—Distress by landlord within three months before receiving order—Rent due from debtor's husband—Goods of debtor taken and sold—Assets insufficient to satisfy priority debts—Right of trustee to charge over proceeds of sale in favour of priority creditors.
See Bankruptcy.

2. —— Company — Voluntary liquidation—Previous distress—Indebtedness for purchase tax—Distress authorized by Commissioners of Customs and Excise—Stay of distress.
See Company.

EASEMENT—*Support — Enjoyment claim — Imputation to owner of servient tenement of knowledge or opportunity of acquiring knowledge — Alteration in dominant tenement — Change in burden on servient tenement.*
Lloyds Bank, Ld. *v.* Dalton
Bennett J. 466

EMERGENCY LEGISLATION — *Application for leave to exercise remedy—Question to be determined by the court—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.
Warrilow *v.* Ward - **Farwell J. 257**

2. —— *Company — Compulsory winding-up—Debt incurred after outbreak of war—Jurisdiction of court to stay proceedings—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 5.
In re Middlesex Brick Co., Ld.
Simonds J. 65

3. —— *Hire-purchase — Payments in arrear — Agreement between parties to determine contract—Owners to retake goods and refund part of money paid by hirer—Bargain freely entered into—Necessity to obtain leave of court—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.) *— Liabilities (War-Time Adjustment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *s.* 26, *sub-s.* 2.
Smart Bros., Ld. *v.* Ross - **C. A. 158**

4. —— *Mortgage—Appointment of receiver — Alleged breach of covenant to repair — Need to make out prima facie case of right to appoint receiver — Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*), *sub-s.* 4.
In re Fraser-Taylor's Application
Morton J. 40

EMERGENCY LEGISLATION—*continued.*

5. —— —— —— *Practice — Assignment of equity of redemption—Ex parte application for leave to appoint receiver—Evidence of assignment—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-ss.* 2 (*a*) (*ii*); 4.
In re APPLICATION BY WOOLWICH EQUITABLE BUILDING SOCIETY (HAYWOOD)
Farwell J. 253

6. —— —— —— *Relief — "Person "liable . . . . to perform the obligation"— Assignee of equity of redemption — Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-ss.* 2 (*a*) (*ii*); 4.
In re LEICESTER TEMPERANCE & GENERAL PERMANENT BUILDING SOCIETY'S APPLICATION (GOUGH) - - - - **C. A. 340**

7. —— —— *Bankrupt mortgagor—Trustee in bankruptcy—Summons by mortgagor for leave to appoint receiver—Trustee not a "person liable to . . . . perform the obligation " . . . ."—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 4.
In re MIDLAND BANK, LD.'S APPLICATION (WALLER'S TRUSTEE IN BANKRUPTCY)
Uthwatt J. 61

8. —— —— *Covenant by mortgagor to insure against war risks—Impossibility of performance — Alteration of law — Relief — Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 41), *s.* 11.
In re MOORGATE ESTATES, LD.
Uthwatt J. 321

9. —— —— *Enforcement — Application for leave to exercise remedy—Objection by mortgagor that application made without authority of mortgagee — Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*), (*iv.*).
In re ROYAL MUTUAL BENEFIT BUILDING SOCIETY'S APPLICATION - **Uthwatt J. 75**

10. —— —— *Foreclosure — Possession —Order for possession in order absolute— Enforcement—Writ of possession—Leave to issue—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 3; *s.* 3, *sub-s.* 2—*Possession of Mortgaged Land (Emergency Provisions) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 108), *s.* 1, *sub-s.* 1; *s.* 2, *sub-ss.* 1, 2.
WOOD *v.* SMALLPIECE - - **C. A. 190**

11. —— —— *Taking possession or realisation of security—Need to obtain leave of court —Property mortgaged to assurance society— Collateral mortgage of policy issued by mortgagee—Default in payments under mortgages— Agreement by mortgagor to convey and release property and surrender policy to mortgagee free from equity of redemption—Mortgagee to make cash payment to mortgagor and release mortgagor from covenants in mortgages for payment—Necessity to obtain leave of court—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*), (*ii.*), (*iv.*).
SUN LIFE ASSURANCE SOCIETY *v.* RELTON
Uthwatt J. 384

12. —— *Power of attorney — Tenant for life—Delegation of powers—Appointment of two attorneys to act jointly and severally— Execution of conveyance by one attorney— Execution of Trusts (Emergency Provisions) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 114), *s.* 1, *sub-s.* 1.
In re EARL OF FEVERSHAM'S CONTRACT
Morton J. 33

13. —— *Trading with enemy — Banker — English branch of enemy bank—Winding-up order—Claims of holders of foreign currency accounts — "Creditors" — Date for ascertaining enemy status — Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 3A, *sub-s.* 3.
In re BANCA COMMERCIALE ITALIANA
Simonds J. 406

14. —— —— *Settlement — Power of advancement — Exercise with consent of life tenant—Life tenant enemy alien in enemy territory — Need of consent — Death — Presumption of—Trading with the Enemy Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 7, *sub-s.* 1— *Trading with the Enemy (Custodian) Order,* 1939 (*St. R. & O.*, 1939, *No.* 1198), *para.* 1 (1.).
In re FORSTER'S SETTLEMENT
Morton J. 199

15. —— *Transport—Hire of motor lorry by Minister—Subsequent requisitioning of lorry by Minister—Determination of contract of hire—Defence (General) Regulations,* 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 53 (1.).
LANE *v.* MINISTER OF WAR TRANSPORT
Farwell J. 280 ; C. A. 354

16. —— *Vendor and purchaser—Sale of land — Apportionment of "rates, taxes and "other outgoings" — Instalment of war damage contribution — War Damage Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 12), *s.* 18; *s.* 20, *sub-s.* 1.
In re JACOBS' AND STEDMAN'S CONTRACT
Farwell J. 400

17. —— —— —— *Requisition—Vendor's inability to give vacant possession—Defence (General) Regulations,* 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 51 (1.).
COOK *v.* TAYLOR - - **Simonds J. 349**

18. —— *War damage — Flat — Damage to other parts of building—Loss of services— Unfitness for occupation—Notice of disclaimer —Notice to terminate lease under provision therein — Approbation and reprobation —*

EMERGENCY LEGISLATION—*continued.*

Estoppel—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 1, *sub-ss.* 1, 4.
JOHNSTONE *v.* SWAN ESTATES, LD. **Morton J. 98**

19. —— —— *"Multiple lease"—Right to disclaim — Two buildings used as factory — one building destroyed — Other accommodation not available — Landlord and Tenant (War Damage) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 15, *sub-s.* 3; *s.* 24.
HERRMANN *v.* METROPOLITAN LEATHER CO., LD. - - - - **Uthwatt J. 248**

20. —— —— Notice of disclaimer — Tenant remains as a trespasser — Acquiescence by lessor—Tenancy at will.
See MEYE *v.* ELECTRIC TRANSMISSION, LD. (sub tit. LANDLORD AND TENANT).

ENEMY — Writ — Service — Dispensation — "Enemy" — "Resident in enemy "territory"—Prisoner of war.
See PRACTICE.
For Trading with the Enemy, *see* EMERGENCY LEGISLATION.

ESTATE DUTY. *See* REVENUE.

EXECUTOR. *See* sub tit. ADMINISTRATION.

FAMILY PROVISION—*Principle on which court will act—Testamentary disposition unreasonable—Husband's application — Wife's estate bequeathed to daughter of first husband—Most of estate derived from first husband—Inheritance (Family Provision) Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1.
In re STYLER - - - **Morton J. 387**

HIRE PURCHASE — Emergency legislation —Payments in arrear—Agreement between parties to determine contract—Owners to retake goods and refund part of money paid by hirer —Bargain freely entered into—Need to obtain leave of court.
See SMART BROS., LD. *v.* ROSS, sub tit. EMERGENCY LEGISLATION (HIRE PURCHASE).

2. —— *Liquidation of hiring company — Resumption of possession of goods by owners — Physical possession not taken—Goods held by third parties to order of owners—Bona fide agreement — Payment of compensation for depreciation of goods — Legality under bankruptcy laws—Penalty—Liquidated damages.*
In re APEX SUPPLY CO., LD. **Simonds J. 108**

IMPRESSMENT—Vehicle.
See ARMY.

INCOME TAX — Annuities — Freedom from.
See under SETTLEMENT; WILL.

INJUNCTION—*Opposition to bill in Parliament—Agreement between local authorities—Provision against opposing bill—Opposition in breach of agreement.*
BILSTON CORPORATION *v.* WOLVERHAMPTON CORPORATION - - - **Simonds J. 391**

INTEREST — *Charge — Shares — Judgment debt and costs—Judgments Act*, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14.
STOKER *v.* ELWELL - - **Simonds J. 243**

INTESTACY. *See* sub tit. ADMINISTRATION.

JUDGMENT — *Enforcement — Charging order—Future liabilities—Discretion.*
ROBINSON *v.* BAILEY - **Simonds J. 268**

LANDLORD AND TENANT—*Lease—Determination—Power to lessee to determine—Covenant by lessor to pay sum to lessee on end or determination of lease—Power to lessee to hold over and call for new lease on same terms if lessor unwilling to pay—Assignment of reversion—Liability of assignee.*
In re HUNTER'S LEASE - **Uthwatt J. 124**

2. —— *Tenancy at will—Holding over—Emergency legislation — War damage — Notice of disclaimer — Tenant remains as a trespasser—Acquiescence by lessor.*
MEYE *v.* ELECTRIC TRANSMISSION, LD. **Bennett J. 290**
See also DISTRESS; EMERGENCY LEGISLATION.

LEASE. *See* LANDLORD AND TENANT.

LEGITIMACY — "Child or children" — "Disposition coming into operation "before commencement of Act"—Will of 1860—Death of testator in 1861—Appointment in 1934 in favour of legitimated child — Validity.
See under POWER OF APPOINTMENT.

LIMITATION OF ACTION — Debt — Acknowledgment — Administration —Payment of debts—Executor also creditor — Probate affidavit by executor showing debt due to him—Bankruptcy of executor—Statement of assets—Inclusion of debt.
See sub tit. ADMINISTRATION.

MINES—*Coal mine—Acquisition by Coal Commission — Rents and royalties — Apportionment — Apportionment Act*, 1870 (33 *&* 34 *Vict. c.* 35), *s.* 2—*Coal Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *s.* 5, *sub-s.* 2 (*b*); *s.* 8 (*c*).
COAL COMMISSION *v.* EARL FITZWILLIAM'S ROYALTIES CO. - - **Bennett J. 365**

MORTGAGE — *Interest — Standard rate — Seven per cent. after deduction of income tax — Standard rate not affected by increase of tax—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 1; *s.* 12, *sub-s.* 1 (*b*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *sch. I.*
WARRILOW *v.* WARD - **Farwell J. 257**
See also sub tit. EMERGENCY LEGISLATION.

PATENT—*Patented articles—Sale—Restrictive condition—Knowledge—Relevant time—Certificate of validity—Grant—Whether prima facie evidence sufficient.*
GILLETTE INDUSTRIES, LD. *v.* BERNSTEIN **C. A. 45**

POWER OF ADVANCEMENT.
See In re FORSTER'S SETTLEMENT, sub tit. EMERGENCY LEGISLATION (TRADING WITH THE ENEMY).

POWER OF APPOINTMENT—*Legitimacy—"Child or children"—"Disposition coming "into operation before commencement of Act"—Will of* 1860—*Death of testator in* 1861—*Appointment in* 1934 *in favour of legitimated child — Validity—Legitimacy Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 10, *sub-s.* 2.
In re HOFF - - - **Farwell J. 298**

2. —— *Power to appoint by deed or will—Will exercising power — Subsequent exercise of power by deed—Trusts inconsistent with those of previous appointment — Effect of exercise of power by will.*
In re BUTLER'S SETTLEMENT TRUSTS **Bennett J. 403**
See also sub tit. WILL.

POWER OF ATTORNEY. *See* sub tit. EMERGENCY LEGISLATION.

PRACTICE — Administration — Proceedings for appointment of receiver — Proceedings begun before grant of probate obtained—Writ—R. S. C., O. LV., rr. 3, 4, 5—Undertaking by creditor to procure grant to himself—No security ordered—Obligation of receiver to account.
See In re SUTCLIFFE, sub tit. ADMINISTRATION.

2. —— Costs. *See* COSTS.

3. —— *Writ — Service — Dispensation — "Enemy"—"Resident in enemy territory" — Prisoner of war—R. S. C., O.* IX., *r.* 14B, *sub-r.* 1.
VANDYKE *v.* ADAMS - **Farwell J. 155**

RAILWAY—Rates—Amendment of current valuation list—Proposal made after end of first railway quinquennial period, but before completion of second valuation roll—Validity.
See WORTHING CORPORATION *v.* SOUTHERN RY. CO., sub tit. RATES.

RATES—*Railway—Amendment of current valuation list—Proposal made after end of first railway quinquennial period, but before completion of second valuation roll—Validity—Railways (Valuation for Rating) Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 18, *sub-s.* 3.
WORTHING CORPORATION *v* SOUTHERN RAILWAY CO. - **Uthwatt J. 178; C. A. 437**

REQUISITION. *See* EMERGENCY LEGISLATION.

REVENUE — *Estate duty — Settled estate — Death of settlor—Payment of duty by tenant for life—Statutory charge in her favour—Release of charge—Death of tenant for life—Liability of estate for duty on amount paid by tenant for life—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*), (*c*); *s.* 5, *sub-s.* 2 (*as amended by Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14 (*a*)); *s.* 9, *sub-s.* 6; *s.* 22, *sub-s.* 2 (*a*).
In re HALL - - - **C. A. 140**

2. —— *Will — Legacy — Disclaimer — Estate duty—"Competent to dispose of" — Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2; *s.* 22, *sub-s.* 2 (*a*).
In re PARSONS - - **Farwell J. 335**

SETTLEMENT — *Annuity — "Such a sum "as shall after all deductions" amount to* 300*l. a year—Freedom from income tax.*
In re BEST. BELK *v.* BEST **Bennett J. 77**

2. —— *Construction — Protective life interest — Forfeiture clause — Subsequent deed varying trusts of settlement — Income payable to beneficiary limited to* 1000*l.—Contingent interest in capital and accumulations—Vested interest in persons entitled in remainder.*
In re DENNIS'S SETTLEMENT TRUSTS **Farwell J. 283**

3. —— *Gifts to children — Interest of daughter in income and trust fund—Death of daughter without issue—Implication of gift over.*
In re BICKERTON'S SETTLEMENT **Uthwatt J. 84**

4. —— Power of advancement—Exercise with consent of life tenant—Life tenant enemy alien in enemy territory—Need of consent—Death—Presumption.
See In re FORSTER'S SETTLEMENT, sub tit. EMERGENCY LEGISLATION.

5. —— *Trust fund—Division into unequal shares—Failure of trusts of any share—Accruer to other shares—Proportions.*
In re BOWER'S SETTLEMENT TRUSTS **Morton J. 197**

TRADING WITH THE ENEMY. *See* EMERGENCY LEGISLATION.

TRUST — *Breach — Liability of agent of trustees.*
Williams-Ashman *v.* Price and Williams **Bennett J. 219**

2. —— *Trustee — Disclaimer of office — Estoppel—Indorsement on counsel's brief—Order of court.*
In re Sharman's Will Trusts **Bennett J. 311**

3. —— —— *Settlement of difference relating to trust—Sanction by court—Infant beneficiaries—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 15 (*f*).
In re Ezekiel's Settlement Trusts **C. A. 230**

VENDOR AND PURCHASER—Sale of land —Apportionment of "rates, taxes "and other outgoings"—Instalment of war damage contribution. *See In re* Jacob's and Stedman's Contract, sub tit. Emergency Legislation.

2. —— —— Requisition — Vendor's inability to give vacant possession. *See* Cook *v.* Taylor, sub tit. Emergency Legislation (Vendor and Purchaser).

WAR DAMAGE. *See* Emergency Legislation.

WILL — *Administration — Survivorship — Simultaneous deaths of husband and wife — Statutory presumption—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.
In re Lindop - - **Bennett J. 377**

2. —— *Annuity—Direction to appropriate capital sum to meet annuity — Gift over of capital subject to annuity—Death of annuitant before testatrix—Effect on gift over.*
In re Clarke - - - **Farwell J. 434**

3. —— —— "*Free of income tax*" — *Rate of tax—Will dated before September* 3, 1939—*Testator's death after that date—Finance Act,* 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.
In re Waring **Farwell J. 309 ; C. A. 426**

4. —— —— *Freedom from income tax — Sufficiency of direction.*
In re Skinner. Milbourne *v.* Skinner **Morton J. 82**

5. —— *Condition subsequent — Forfeiture clause — Validity — Prohibition of marriage with a person not "of Jewish parentage and "of the Jewish faith."*
In re Samuel (Deceased). Jacobs *v.* Ramsden - - - - **C. A. 1**

6. —— *Conditional gift—Shares in company—Personal liability—Charge.*
In re Lester - - **Simonds J. 324**

WILL—*continued.*

7. —— *Construction — Devise of realty "duty free"—Freedom from legacy duty on sum applied in paying estate duty and succession duty—Some gifts of real and personal property to beneficiary free of duty and others not so—Additional devise in codicil silent as to duty—Freedom from duty of devise in codicil —Direction to pay "all duties payable in "respect of my estate"—Limitation to gifts made expressly free of duty.*
In re King - - - - **C. A. 413**

8. —— —— *Gift — "All moneys of which "I die possessed of" — Exclusion of investments, household effects and freehold property.*
In re Morgan - - - **C. A. 345**

9. —— —— *Legacy — Incorporation — Existing document or future document which may be substituted— Validity.*
In re Jones - - - **Simonds J. 328**

10. —— —— *Residue to X "and/or" Y —Joint tenancy.*
In re Lewis - - **Farwell J. 424**

11. —— —— *Rule in Shelley's Case—Devise to X for life and then to the heirs male of his body living at his decease his heirs and assigns for ever and failing such issue a gift over—Issue of X, one daughter—Predecease of X by daughter—Eldest son her surviving.*
In re Routledge - - **Bennett J. 457**

12. —— *Hotchpot—Power of appointment —Interests of children and remoter issue—Liability to hotchpot—Life and reversionary interests—Valuation.*
In re Gordon - - **Uthwatt J. 131**

13. —— Legacy — Disclaimer — Estate duty — "Competent to dispose of." *See In re* Parsons, sub tit. Revenue.

WINDING-UP. *See* sub tit. Company.

WORDS :—
"A clear annuity" : *In re* Skinner **Morton J. 82**

"Business purposes" : *In re* Ogilby **Simonds J. 288**

"Due diligence" (in administration) : *In re* Tankard - **Uthwatt J. 69**

"Enemy," in s. 2, sub-s. 1 (*b*) of the Trading with the Enemy Act, 1939 : Vandyke *v.* Adams - **Farwell J. 155**

"Free of all deductions" : *In re* Skinner **Morton J. 82**

"Free of income tax (but not free of "sur-tax)" : *In re* Skinner **Morton J. 82**

"Personal chattels" : *In re* Ogilby **Simonds J. 288**

WRIT. *See* Practice.

THE

LAW REPORTS.

Under the Superintendence and Control of the
NCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

CHANCERY DIVISION.

(Including Bankruptcy Cases.)

1942.—Vol. I. Ch.

(p. 1 to p. 67).

Part I.—January.

TABLE OF CASES.

CHANCERY DIVISION.

PAGE
Feversham's (Earl of) Contract, *In re* 33
Fraser-Taylor's Application, *In re* 40
Gardner, *In re.* *Ex parte* Official Receiver 50
Gess, *In re.* Gess *v.* Royal Exchange Assurance 37
Gillette Industries, Ld. *v.* Bernstein .. .. C. A. 45
Middlesex Brick Co., Ld., *In re* 65
Midland Bank, Ld.'s Application, *In re.* (Waller's Trustee in Bankruptcy) 61
Samuel, *In re.* Jacobs *v.* Ramsden .. .. C. A. 1

For Mode of Citation, see Beginning of Index.
[*For Names of Editors and Reporters, see Inside.*]

PUBLISHED by THE COUNCIL at its office, 6, STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C. 2,
AND
Printed by WATERLOW & SONS LIMITED, LONDON WALL, LONDON, E.C. 2.

"THE LAW REPORTS, 1942," for January consist of :—
Chancery Division ... ... Part I.
King's Bench and Probate Divisions ... ... Part I.

EDITOR—RALPH SUTTON, K.C.

ASSISTANT EDITOR ... ... } G. F. L. BRIDGMAN, *Barrister-at-Law.*
ASSISTANT EDITOR (CURRENT DIGEST) }

ASSISTANT EDITORS (WEEKLY NOTES) { F. PORTER FAUSSET, } *Barristers-at-Law.*
{ F. H. COWPER, }

REPORTERS :

House of Lords ... ... J. S. HENDERSON, *Barrister-at-Law.*

Privy Council ... ... CHARLES CLAYTON, *Barrister-at-Law.*

Court of Appeal, No. 1 ... { H. C. GARSIA, P. J. BOLAND, } *Barristers-at-Law.*

Chancery Division ... ... { J. L. DENISON, H. LANGFORD LEWIS, K. R. A. HART, F. H. COWPER, } *Barristers-at-Law.*

Court of Appeal, No. 2 ...
King's Bench Division ...
Court of Criminal Appeal, and Railway and Canal Commission Cases ...
{ R. F. STUBBING, W. L. L. BELL, F. PORTER FAUSSET, G. F. L. BRIDGMAN, J. W. HALL, A. W. GRANT, } *Barristers-at-Law.*

Probate and Divorce ... WM. LATEY, *Barrister-at-Law.*

Admiralty Cases ... ... E. C. M. TREHERN, *Barrister-at-Law.*

Ecclesiastical Cases ... W. L. L. BELL, *Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

SPECIAL NOTICE.

The **LORD CHANCELLOR** has informed the Council that the production and publication of the **LAW REPORTS** is of National Importance.

The Law Reporting Committee in their Report issued in March, 1940, recorded their opinion that the Law Reports are in merit pre-eminent and, since they get no public subsidy, it is the obligation of the legal profession to ensure that they are adequately supported.

The profession are invited to assist the Council by continuing to subscribe throughout the war.

THE LAW REPORTS, 1942

(in which the reports of all judgments are revised by the judges concerned.)

The Entire Series, Unbound. Thick or Thin Editions

(with which are presented the Statutes, Weekly Notes and Current Digest).

Delivered as issued, Carriage Paid.

Subscription £6 6s. 0d.

The Subscription List is now open and will close on 31st January, 1942.

The Subscription if paid after List is closed will be £7 7s. 0d.

No issues of the publications will be delivered until the subscription has been paid.

The Council take special precautions to assure delivery, but they accept no liability for loss, damage or delay in transit.

Communications should be addressed to

The SECRETARY, COUNCIL OF LAW REPORTING,
6, Stone Buildings, Lincoln's Inn, London, W.C.2.

Letters as to *Cases*, should give name of Case, Court and Date of Hearing, and be addressed to the Editor, at the above address.

PRICES OF THE PUBLICATIONS OF THE COUNCIL.

		£	s.	d.
THE LAW REPORTS, 1942 (with which are presented the *Weekly Notes*, *Statutes* and *Current Digest*)	(unbound)	6	6	0
WEEKLY NOTES, 1942	(unbound)	1	10	0
CURRENT DIGEST, 1942 (a Digest of cases reported in the Law Reports and other series)	(unbound)	1	1	0
INDIAN APPEALS, 1942	(unbound)	1	1	0

BINDING.

The Council are the only official binders of their publications, and they employ no agents in their binding business. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

LAW REPORTS.

	Ordinary Edition. s.	Ordinary Edition. d.	Thin Edition. s.	Thin Edition. d.	
Cloth ..	7	0	8	9	per Vol.
Buckram ..	8	9	10	3	„
Half-Calf ..	10	0	12	3	„
Half-Morocco	12	3	14	0	„
Calf ..	14	3	16	0	„
Full Morocco (Limp)	—		1 1	0	„

WEEKLY NOTES.

	Notes of Cases. s.	Notes of Cases. d.	Notes of Cases and Miscellaneous. s.	Notes of Cases and Miscellaneous. d.
Cloth	7	6	8	0
Buckram	10	0	10	3
Half-Calf	12	6	13	0
Half-Morocco ..	13	6	13	9
Calf	16	9	17	9

The *Law Reports* and *Statutes* for 1941 consist of 6 Volumes. In the thin-paper edition these may be bound as 4 Volumes.

Unbound parts should be sent, carriage paid, to 6, Stone Buildings, Lincoln's Inn, London, W.C.2, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made. Unbound parts will be collected, upon request, within a two-mile area of the Law Courts free of charge.

When the Subscriber's address is not more than two miles from the Law Courts no charge will be made for the cost of carriage of bound volumes for the year, beyond that distance but within the London Area **2s.**, outside that area but within the United Kingdom (including Northern Ireland) **4s.** (Thin Edition **2s.**), and in the Dominions, Crown Colonies or abroad the full cost will be charged.

All sums payable to the Council must be prepaid.

Cheques and Money Orders should be crossed and made payable to the "Council of Law Reporting" and not to the Secretary or any individual. Remittances from abroad must be made payable in London.

JUST PUBLISHED.

"POCKET SUPPLEMENT" bringing the work completely up to date.

BUTTERWORTHS' MODERN
TEXT-BOOKS AND SERVICE

EXCESS PROFITS TAX

by

CYRIL LANDER KING
Of the Middle Temple; One of His Majesty's Counsel,
and
MICHAEL MOORE, F.C.A.

BRILLIANTLY REVIEWED.

"The names of the authors of this work at once inspire confidence, and Mr. Cyril King's wide experience as specialising counsel combined with Mr. Moore's expert practical knowledge as an accountant have produced a work the usefulness of which the practitioner will very quickly appreciate . . . . The authors are to be congratulated on illuminating many obscurities. THE ACCOUNTANT.

"Several books have been published on Excess Profits Tax, but this is the most ambitious of them . . . . The book may be recommended with confidence to all practitioners who have to deal with this very difficult branch of law." THE LAW TIMES.

"The authors' modesty, therefore, has rather obscured the magnitude of their task and the success they have achieved in dealing with a mass of complicated detail, every item of which called for the exercise of nice judgment, infinite patience and great knowledge . . . . A perusal of the work . . . . has left an abiding sense of the gratitude that the authors deserve from all those who have to bear or advise upon Excess Profits Tax." THE LAW JOURNAL.

Kept up to date by a ***Service*** *for which a pocket is provided at the back of the book, to be issued from time to time, at a maximum charge of 5s. per issue.*

Price 45/- (including "Pocket Supplement")
postage 1/- extra

BUTTERWORTH & CO. (Publishers) LTD.
BELL YARD TEMPLE BAR LONDON, W.C.2

UL 17 SEP 1982